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IN THE

# Supreme Court of the United States

October Term, 1982

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
*Petitioner,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether, after expressly recognizing its lack of constitutional power directly to require the States to extend unemployment compensation coverage to state and local employees, Congress, in the 1976 Amendments to the Federal Unemployment Tax Act ("FUTA"), indirectly has required this coverage by imposing a penalty for the States' failure to extend this coverage, consisting of the forfeiture by private employers of a federal tax credit, amounting to at least one billion dollars per year in California, and the forfeiture by the States of funds essential to the administration of their unemployment compensation programs, the payment of extended unemployment compensation to former employees of private employers, and the establishment and maintenance of public employment offices.

2. Whether, by requiring the States to extend unemployment compensation coverage to state and local employees, by dictating the terms of this coverage, by requiring state and local governments to pay to the Secretary of the Treasury all amounts raised for coverage of their employees, and by providing that these State and local government moneys may be spent only as prescribed by Congress, those provisions of the FUTA as amended pertaining to the coverage of state and local government employees violate established principles of Federalism in that they: a) deprive the States of the sovereignty reserved to them by the tenth amendment to the Constitution; and b) impose on state and local governments a federal tax, in violation of the doctrine of intergovernmental tax immunity, and thereby deny the States the constitutional guarantee of a republican form of government.

3. Whether the doctrines of *res judicata* and collateral estoppel are applicable where no court has addressed the merits of this petitioner's claims and where the issues presented are of "monumental significance" in that they raise the question of

the power of the federal government to impose a federal tax on state and local governments and to force state and local governments to surrender to the federal government control of state and local government funds and traditional governmental functions and decisions.

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*Petitioner,*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner City of Burbank* respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 6, 1982, affirming the dismissal of the complaint in this action.

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*In addition to petitioner City of Burbank and respondent United States of America, the remaining parties to this suit are the following respondents: the Honorable Raymond J. Donovan, Secretary of Labor; the Honorable Donald R. Regan, Secretary of the Treasury; and the Honorable Roscoe L. Egger, Commissioner of the Internal Revenue Service. Pursuant to Fed.R.App. P. 43(c), the Ninth Circuit substituted the last three parties for their respective predecessors: the Honorable F. Raymond Marshall; the Honorable G. William Miller; and the Honorable Jerome Kurtz.

## OPINIONS BELOW

The Memorandum opinion of the Ninth Circuit affirming the district court's dismissal of petitioner's complaint is unreported at present, and is reprinted in Appendix A at 1a. The district court's Order of Dismissal is reprinted in Appendix B at 6a.

## JURISDICTION

The judgment of the Ninth Circuit was entered on July 6, 1982, and is reprinted in Appendix D at 53a. This petition is filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

## CONSTITUTIONAL AND STATURORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, the Federal Unemployment Tax Act, related federal statutes, and the 1978 law amending California's unemployment compensation law are reprinted in Appendix E at 54a.

## STATEMENT OF THE CASE

### A. Introduction.

The Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments")[1] amended the Federal Unemployment Tax Act ("FUTA"),[2] and, for the first time, Congress "require[d] the States to provide unemployment compensation coverage to all employees of State and local govern-

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[1]Pub. L. No. 94-566, 90 Stat. 2667.

[2]26 U.S.C. §§ 3301-3311 (1976 & Supp. IV 1980), 26 U.S.C.A. §§ 3301-3311 (West. Supp. 1982), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 193, 271-273, 276-277, 96 Stat. 324, 408-09, 554-57, 558-59. For ease of reference, further citations to the FUTA will be to the U.S.C.

ments"[3]. Congress has imposed this requirement on the States by denying private employers a credit, in excess of one billion dollars per year in California, against their federal unemployment tax unless their State's unemployment compensation law extends unemployment compensation coverage to state and local employees. In addition, Congress made the expenditure of certain federal funds within the States dependent upon coverage of state and local employees.

California amended its unemployment compensation law to extend unemployment compensation coverage to state and local employees. Petitioner has made the payments necessitated by the 1976 Amendments, and has brought this action to recover the amounts paid, and to have declared unconstitutional those portions of the 1976 Amendments requiring coverage of state and local government employees.

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[3]S. Rep. No. 1265, 95th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5997, 5997 [hereinafter cited as Senate Report]. Under section 3309 (b)(3) of the FUTA, a very limited number of state and local employees is excepted from coverage.

Title I of the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695, amended the FUTA to require States to provide unemployment compensation coverage to certain employees of state and local hospitals and institutions of higher learning. Coverage of these employees was subsumed by the 1976 Amendments. To the extent that the 1976 Amendments are held unconstitutional with respect to their coverage of all state and local employees, the 1970 amendments also should be held unconstitutional with respect to the coverage they provided state and local employees because the 1976 Amendments and the 1970 amendments use the same mechanism to require coverage of the state and local employees specified therein.

## II. Application of the Statutory Scheme to Public Sector Employment.

Section 3302(a) of the FUTA allows a private employer[4] to credit against the tax imposed by section 3301[5] amounts that employer pays during the taxable year to a state unemployment compensation fund established pursuant to a state unemployment compensation law which has been certified by the Secretary of Labor. The criteria for certification are set forth in section 3304(a).

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[4]"Employer" is defined in section 3306(a), and, generally, means a person who pays at least $1,500.00 in wages during a quarter of a calendar year or employs at least one person for a minimum of 20 days during the calendar year or the preceding calendar year with each of the days being in a different calendar week.

[5]Under sections 3301(1) and 3306(b) private employers, at present, pay a federal tax equal to 3.4 percent of the first $6,000.00 ($204.00) in wages paid to each employee. The maximum credit allowed each employer is 90 percent of the section 3301 tax, which, for purposes of the credit, is computed at 3 percent instead of 3.4 percent. 26 U.S.C. § 3302(c)(1), (d)(1). This equals $162.00 or 2.7 percent of $6,000.00.

Effective January 1, 1983, private employers will pay a federal tax equal to 3.5 percent of the first $7,000.00 ($245.00) in wages paid to each employee. Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, § 271(a), (b)(1), (d)(1), 96 Stat. 324, 554-55 (amending sections 3301(1), 3306(b)). The maximum credit allowed each employer will remain at 90 percent of the section 3301 tax, and will continue to be computed in the same manner. Accordingly, private employers will be allowed a maximum credit of $189.00 or 2.7 percent of $7,000.00.

On January 1, 1985, the rate of tax will be increased to 6.2 percent. *Id.* § 271(c)(1)(A), (d)(2), 96 Stat. at 555. The wage base will remain at $7,000.00, and the maximum allowable credit will remain at 90 percent of the section 3301 tax. However, for purposes of computing the credit, the tax will be computed at 6 percent. *Id.* § 271(c)(2)(B), 96 Stat. at 555 (amending section 3302(d)(1). The amount of tax, therefore, will equal $434.00, and the maximum allowable credit will be $378.000 or 5.4 percent of $7,000.00.

Section 3304(a)(6)(A) requires the state law to extend unemployment compensation coverage to service to which section 3309(a)(1) applies, and requires the coverage to be identical to the state law's coverage of other service subject to the FUTA. By virtue of the 1976 Amendments, section 3309(a)(1)(B) applies to service excluded from the definition of "employment" in section 3306(c)(7). Section 3306(c)(7), in turn, excludes:

> service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of an instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301.

Accordingly, the Secretary may certify a State's unemployment compensation law only if the law extends unemployment compensation coverage to state and local employees on exactly the same terms it extends to employees of private employers.

Section 3304(a) certification also is dependent upon the state law's requiring immediate payment to the Secretary of the Treasury for credit to the federal Unemployment Trust Fund[6] of all monies received in the State's unemployment fund.[7] Under the 1976 Amendments, this provision is applicable to monies paid by state and local governments for unemployment compensation coverage of their employees. The Amendments,

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[6]The federal Unemployment Trust Fund was established pursuant to 42 U.S.C. § 1104(a)(1976). Section 1104(a) authorizes and directs the Secretary of the Treasury to receive and hold all money deposited in the Unemployment Trust Fund from a state unemployment fund.

[7]26 U.S.C. § 3304(a)(3).

however, do not specify the means by which these entities are to finance the coverage of their employees.[8]

Section 3304(a) certification is essential not only to the allowance of a tax credit to private employers but also to the expenditure of certain federal funds in the State. Pursuant to 42 U.S.C. § 1101(b)(1) (1976), 100 percent of the tax derived from the FUTA is deposited in the federal Unemployment Trust Fund and credited to the employment security administration account established by 42 U.S.C. § 1101(a) (1976). 42 U.S.C. § 1101(c)(1)(A)(i) (1976) makes these funds available for the administration costs of the States' unemployment compensation programs. However, 42 U.S.C. §§ 502(a), 503(a), 1103(b)(1)(B) (1976) prohibit payment to a State for such costs if the State's unemployment compensation law has not been certified under the FUTA.

Pursuant to 42 U.S.C. § 1105(b)(1) (1976), funds in the employment security administration account also are used for the payment of extended unemployment compensation benefits under the Federal-State Extended Unemployment Compensation Act of 1970 ("Extended Compensation Act")[9]. Section

[8]The State's law must allow state and local governments the option of reimbursing the state unemployment fund for amounts actually paid their former employees in lieu of making regular contributions to the fund. 26 U.S.C. §§ 3304(a)(6)(B), 3309(a)(2). Due to budgetary constraints, petitioner chose the regular contribution method rather than the reimbursement method. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Notice of Motion and Motion To Dismiss at 3 [hereinafter cited as Plaintiffs' Memo].

[9]Pub. L. No. 91-373, Title II, 84 Stat. 708 (codified as amended at 26 U.S.C. § 3304 note (1976 & Supp. IV 1980), 26 U.S.C.A. § 3304 note (West Supp. 1982)), *as amended by* Tax Equity and Fiscal Responsibility, Act of 1982, Pub. L.No. 97-248, § 191, 96 Stat. 324, 407. Extended unemployment compensation is payable during periods of high unemployment in a State to individuals who have exhausted their rights to regular unemployment compensation. Regular unemployment compensation is compensation payable to an individual pursuant to a State's unemployment compensation law, other than extended and additional compensation. *Id.* § 205.

204(1) of the Extended Compensation Act provides for payment to the States of one-half of the extended unemployment compensation payable to former employees of private employers, but 42 U.S.C. § 1103(b)(1)(B) prohibits these payments to any State whose unemployment compensation law has not been certified under section 3304(a). Similarly, 29 U.S.C.A. § 49d (West Supp. 1982), 42 U.S.C. § 1101(c)(1)(A)(ii) (1976) appropriate from the employment security administration account for payment to the States funds for the establishment and maintenance of public employment offices 29 U.S.C.A. § 49d(b), 42 U.S.C. § 1103(b)(1)(B), however, forbid payment of these costs to a State if its unemployment compensation law is lacking section 3304(a) certification.

Therefore, the failure of a State to extend unemployment compensation coverage to state and local employees results in the denial to that State of federal funds for the administration of its unemployment compensation program, the payment of extended unemployment compensation, and the establishment and maintenance of public employment offices.

## III. Actions Taken By the State of California in Consequence of the 1976 Amendments.

In 1978, California amended its unemployment compensation law to extend coverage to state and local employees.[10] The stated purpose for the amendments was "to implement Public Law 94-566 [the 1976 Amendments], which is hereby deemed to be a 'federal mandate' within the meaning of Sections 2206 and 2271 of the Revenue and Taxation Code" because,

> [u]nless California enacts this act to be operative not later than January 1, 1978, California's unemployment insurance program will be out of conformity with the mandates of federal law under Public Law 94-566. This would seriously disrupt California's economy by the imposition of burdensome federal

[10] 1978 Cal. Stat. Ch. 2.

> taxes on California employers and imperil the payment of unemployment benefits by the denial of federal funds to pay for the administration of such benefits to unemployed claimants in California.[11]

The 1978 amendments also provided that, if this Court holds the 1976 Amendments to be unconstitutional, those portions of California's law which extend unemployment compensation coverage to state and local employees, pursuant to the 1976 Amendments, immediately become inoperative.[12] California's unemployment compensation law is in conformity with section 3304 of the FUTA, and has been so certified by the Secretary of Labor.

**IV. Proceedings Below.**

Petitioner instituted this action on January 17, 1980, to enjoin the enforcement of, and to have declared unconstitutional the 1976 Amendments.[13] In addition, petitioner sought to recover from defendants the amounts which it had paid by virtue of the 1976 Amendments.[14] Jurisdiction was founded on 26 U.S.C. § 7422 (1976), 28 U.S.C. §§ 1346(a)(1), 1331 (1976).[15]

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[11] *Id.* §§ 106,108.

[12] *Id.* § 104.

[13] Compl. ¶ 17. (83a; the complaint is reprinted in Appendix F at 77a.)

[14] *Id.* ¶¶ 12, 13. (81a-82a.) At the time the complaint was filed petitioner had paid in excess of $123,599.84, which amount represented petitioner's payments through March 31, 1979. *Id.* ¶¶ 11-13. At present, petitioner's payments are more than twice this amount.

[15] Compl. ¶ 1. (78a.) By accident, the complaint actually alleged jurisdiction, in part, under "*26* U.S.C. § 1346(a)(1)". (Emphasis added.) Although there was a 26 U.S.C. § 1346, which related to recovery of unconstitutional federal taxes, that section was repealed in 1976. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1901(a)(148), 90 Stat. 1520, 1788. Because 26 U.S.C. § 1346 comprised one section, there was no subsection (a)(1) as there is with 28 U.S.C. § 1346, which relates to civil actions against the United States for the recovery of illegally assessed or collected internal revenue taxes. The intended jurisdictional base, therefore, was 28 U.S.C. § 1346(a)(1) (1976).

The complaint alleged that the 1976 Amendments: 1) imposed a federal tax on the performance of petitioner's vital governmental operations in violation of its constitutional immunity from federal taxation; and 2) impaired petitioner's ability to function effectively in the federal system by displacing its employment policies and impairing its ability to provide traditional governmental services in violation of the tenth amendment and principles of Federalism.[16]

Without addressing the merits of petitioner's claims, the United States District Court for the Central District of California concluded that *New Hampshire Department of Employment Security v. Marshall*[17] and *County of Los Angeles v. Marshall*[18] were *res judicata* as to this action and dismissed the complaint.[19] The United States Court of Appeals for the Ninth Circuit affirmed, holding *County of Los Angeles v. Marshall* to be *res judicata* as to petitioner's claim for declaratory and injunctive relief and collateral estoppel as to its claim for a refund.[20]

## REASONS FOR GRANTING THE WRIT

### I. Summary.

Through the 1976 Amendments to the FUTA, Congress fundamentally has restructured the relationship between the federal government and state and local governments. The Amendments deprive the States of the sovereignty reserved to them by the tenth amendment to the Constitution, deny them the republican

[16]Compl. ¶10. (80a.)

[17]616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 806 (1980). (This opinion is reprinted in Appendix C at 31a.)

[18]631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980). (This opinion is reprinted in Appendix C at 8a.)

[19]City of Burbank v. United States, No. 80-00205 MML(GX) (C.D. Cal. June 20, 1980, *aff'd,* No. 80-5548 (9th Cir. July 6, 1982), *petition for cert. filed,* No. 82-____ (U.S. Oct. 1, 1982)

[20]City of Burbank v. United States, No. 80-5548, (9th Cir. 1982), *petition for cert. filed,* No. 82-____ (U.S. Oct. 1, 1982).

form of government guaranteed by art. IV, § 4 of the Constitution, and violate the doctrine of intergovernmental tax immunity. Congress has achieved this result by requiring state and local governments to provide unemployment compensation coverage to their employees, by dictating the terms of this coverage, and by imposing on state and local governments, for expenditure as directed by Congress, a federal tax.

In *Fairbanks v. United States,*[21] this Court reiterated "the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."[22] This is precisely what Congress sought to do when it drafted the 1976 Amendments. Congress made compliance appear voluntary, and avoided referring to the amounts state and local governments pay the Secretary of the Treasury as a "tax." However, as even the most cursory examination reveals, the 1976 Amendments suffer from the same flaw as the amendments which this Court held unconstitutional in *National League of Cities v. Usery,*[23] and, largely through the imposition of a federal tax and the subjection of state and local government funds to congressional control, impact state and local governments in such a way as to deprive the States of a republican form of government. If the Amendments are allowed to stand, Congress will have been able to accomplish indirectly exactly that which it concededly was unable to accomplish directly.

The lower courts should not have applied *res judicata* and collateral estoppel to this action. No court has addressed the merits of this petitioner's claims. Further, the importance of the issues raised by this suit, *i.e.*, the constitutional power of Congress to preempt the traditional power of state and local govern-

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[21] 181 U.S. 283 (1901).

[22] *Id.* at 294; *accord* Macallen Co. v. Massachusetts, 279 U.S. 620, 629 (1929); *see* United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. La Franca, 282 U.S. 568, 572 (1931).

[23] 426 U.S. 833 (1976).

ments to structure relations with their employees and to deprive state and local governments of the means by which they provide vital governmental services through imposition of a federal tax, and traditional rules of fairness demand that *res judicata* and collateral estoppel not be employed to avoid resolution on the merits of petitioner's claims.

## II. Compliance by the States with the 1976 Amendments Is Mandatory.

In *National League of Cities*, this Court struck down the 1974 amendments[24] to Fair Labor Standards Act ("FLSA"),[25] which required state and local governments to abide by the minimum wage and maximum hour provisions of the FLSA. As shown at 2-3 *supra*, in enacting the 1976 Amendments, Congress declared its intention to require the States to extend unemployment compensation coverage to state and local employees. However, aware of the decision in *National League of Cities*,[26] Congress structured the Amendments to give the impression, superficially at least, that the States have the option of noncompliance. This illusion does not withstand scrutiny.

The consequences of a State's noncompliance fall on state and local governments and private employers within the State, as well as on their former employees and other persons seeking employment within the State. Were a State not to extend unemployment compensation coverage to state and local employees on the terms dictated by the FUTA, the State's unemployment compensation law would lose its certification, and private employers within the State would forfeit their

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[24]Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55.

[25]29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980).

[26]"A recent Supreme Court decision (*National League of Cities v. Usery*) invalidated provisions of the 1974 Fair Labor Standards Amendments which had extended minimum wage coverage to State and local employees." Senate Report, *supra* note 3, at 9.

federal tax credit.[27] Rather than paying federal tax at a present net rate of .7 percent, these private employers would be required to pay tax at a rate of 3.4 percent, an almost five-fold increase in their federal tax.[28] In addition, for the reasons set forth at 6 - 7 *supra,* federal law would prohibit the expenditure of funds, including the revenue derived from the 3.4 percent tax, for administration of the State's unemployment compensation program, for extended unemployment compensation payments to former private sector employees within the State, and for the establishment and maintenance of public employment offices within the State.

At the time California was considering conforming its unemployment compensation law to the 1976 Amendments, the cost per year to private employers of California's loss of certification would have been approximately one billion dollars.[29] Further, California would have forfeited more than $80 million in federal funds for the administration of its unemployment compensation program and the establishment and

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[27]26 U.S.C. §§ 3302(a)(1), 3304(a)(6)(A).

[28]Through the 1982 amendments to the FUTA, Congress has made the consequences to private employers of their State's noncompliance even more severe than the present consequences. At present, if a State loses its certification, private employers forfeit a maximum credit of $162.00 per employee, and, therefore, must pay a federal tax of $204.00 per employee rather than $42.00 *See supra* note 5. In 1983 and 1984, these amounts are increased so that, for each employee, private employers would forfeit a maximum credit of $189.00, and would pay a federal tax of $245.00 instead of $56.00. *See Id.* Beginning in 1985, these amounts are increased further so that, for each employee, private employers would forfeit a maximum credit of $378.00 and would pay a federal tax of $434.00 instead of $56.00. *See Id.*

[29]Declaration of William F. Danielson, ¶ 4, Plaintiff's Memo, *supra* note 8, at Exhibit B. (89 a; Exhibit B is reprinted in Appendix F at 88a.) The Declaration of Mr. Danielson was made on November 21, 1977 and the cost to California's private employers may have increased depending upon the current number of private employers and employees in California. Further, for the reasons set forth at n.28 *supra,* this amount will increase dramatically beginning in 1983.

maintenance of public employment offices,[30] and $120 million for extended unemployment compensation payments[31]. Consequently, California had no choice but to comply with the 1976 Amendments. The consequences of decertification by the Secretary of Labor simply were too onerous for California not to extend unemployment compensation coverage to state and local employees on the terms specified by Congress.

Indeed, no State has been able to afford not to conform its unemployment compensation law to the 1976 Amendments. Under these circumstances, compliance by California, and all other states, is as mandatory as was compliance by the states with the 1974 amendments to the FLSA.

## III. The 1976 Amendments Violate Established Principles of Federalism.

### A. The 1976 Amendments Violate the Tenth Amendment and Represent an Attempt Legislatively To Overrule *National League of Cities*.

Because compliance with the 1976 amendments is required, this Court's decision in *National League of Cities* should be dispositive of the instant suit. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,[32] the Court set forth the three requirements which must be shown to establish a violation of the tenth amendment under the reasoning of *National League of Cities:*

> First, there must be a showing that the challenged statute regulates the 'States as States'. . . . Second, the federal regulation must address matters that are

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[30] *See Id.*

[31] *Id.* This amount may have increased to depending upon the rate of unemployment and the number of unemployed workers who have exhausted their right to regular unemployment compensation. *See* Extended Compensation Act, §§ 202-204.

[32] 452 U.S. 264 (1981).

> indisputably 'attributes of states sovereignty'. . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.[33]

*Hodel* involved a challenge to the constitutonaly of various provisions of the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act"),[34] which was enacted to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations[35]. The district court held that certain provisions of the Surface Mining Act violated the tenth amendment. This Court reversed the district court's holding based on the distinction between *National League of Cities* and the case before it. The Commerce Clause of the Constitution[36] empowered Congress to pass the statutes involved in both suits.[37] The statute at issue in *National League of Cities,* however, sought to regulate the States as States, whereas, the Surface Mining Act sought to regulate private individuals and businesses[38]. The significance of this distinction is that, while Congress may preempt or displace entirely all State involvement in the regulation of private activity affecting interstate commerce[39], there are limits on the power of Congress to regulate the States as States[40]. In *Hodel,* the Court also noted that, under the Surface Mining Act, "the States are not compelled to enforce the steep-slope standards, to expend

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[33] *Id.* at 287-88 (quoting *National League of Cities,* 426 U.S. at 854, 845, 852).

[34] 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), 30 U.S.C.A §§ 1201-1328 (West Supp. 1982) 18 U.S.C.A. § 1114 (West Supp. 1982).

[35] 30 U.S.C. § 1202(a).

[36] Art. 1, § 8, cl. 3.

[37] *Hodel,* 452 U.S. at 281, 286.

[38] *Id.* at 293.

[39] *Id.* at 290.

[40] *National League of Cities,* 426 U.S. at 845.

any state funds or to participate in the federal regulatory program in any manner whatsoever" because, if they choose not to participate, "the full regulatory burden will be borne by the Federal Government."[41] Accordingly, there could "be no suggestion that the [Surface Mining] Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[42] For all of these reasons, this Court held the challenged provisions of the Surface Mining Act not to be violative of the tenth amendment.

The *Hodel* decision is particularly instructive because it highlights the reasons why, under *National League of Cities,* the 1976 Amendments to the FUTA are in derogation of the tenth amendment. The three requirements necessary to establish a tenth amendment violation under *National League of Cities,* as set forth in *Hodel,* are found in the 1976 Amendments. Firstly, there can be no doubt that the 1976 Amendments regulate the States as States. This is confirmed by the previously quoted passage from legislative history of the Amendments wherein Congress expressed its intent to *"require the States* to provide unemployment compensation coverage to all employees of State and local governments."[43] Secondly, it is equally certain, particularly in light of *National League of Cities,*[44] that, because they are directed at the manner in which state and local governments structure relationships with their employees, the 1976 Amendments address a matter that indisputably is an attribute of state sovereignty.

Finally, the 1976 Amendments impair the ability of state and local governments to structure integral operations of traditional functions. Unlike the Surface Mining Act, the Amendments require the expenditure of state and local government funds. Even though unemployment among state and local governments was

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[41] *Hodel,* 452 U.S. at 288.

[42] *Id.*

[43] Senate Report, *supra* note 3, at 1. (Emphasis added.)

[44] 426 U.S. at 845-52.

only about one percent[45], in 1978 the Amendments required state and local governments to spend almost two billion dollars ($2,000,000,000.00) for coverage of their more than twelve million (12,000,000) employees[46]; and this yearly expenditure has increased in subsequent years.[47] The impact on petitioner from the cost of providing unemployment compensation coverage to its employees well illustrates the consequences to state and local governments nationwide from extending such coverage to their employees.[48] Due to the cost of providing unemployment compensation coverage to its employees, petitioner may be unable to hire personnel necessary for the provision of services, may be forced to curtail or eliminate existing services, and may be forced to lay off personnel and forego initiating new programs.[49] In *National League of Cities,* the Court concluded that, by attempting to interfere with the employment practices of state and local governments through

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[45]*See* Testimony of Dr. James D. Van Erden, Joint Appendix at 1133-35, *County of Los Angeles.*

[46]*See* Affidavit of H. Jack Lissenden, ¶ 2, Exhibit C, *Id.* at 591, 596; Affidavit of Leonard L. Moak, ¶ 8d, *Id.* at 516.

[47]*See* Affidavit of H. Jack Lissenden, ¶ 2, Joint Appendix at 591, 596, *County of Los Angeles;* Affidavit of Leonard L. Moak, ¶ 8d, *Id.*

[48]The cost to state and local governments of coverage of their employees is particularly burdensome because, pursuant to subsections 3304(a)(6)(A), (11), they must pay their former employees extended unemployment compensation in accordance with the terms of the Extended Compensation Act. As discused at 6 - 7 *supra,* section 204(1) of the Extended Compensation Act provides for payment by the federal government of one-half of the amount of extended unemployment compensation payable to former employees of private employers. The other half is paid by the States. However, pursuant to section 204(3), the federal government pays none of the amounts payable to former employees of state and local governments. State and local governments pay the entire amount, and, by virtue of section 3304(a)(6)(A) of the FUTA, their former employees must receive the same amount of extended unemployment compensation as former employees of private employers.

[49]Plaintiff's Memo, *supra* note 8, at Exhibit A. (Exhibit A is reprinted in Appendix F at 85a.)

the 1974 amendments to the FLSA, "Congress ha[d] sought to wield its power in a fashion that would impair the States' ability to function effectively in a federal system."[50] The same is true of the 1976 Amendments to the FUTA.

For these reasons, the 1976 Amendments contain the three elements which *Hodel* holds must be present to establish a violation of the tenth amendment under *National League of Cities.*[51]

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[50] *National League of Cities,* 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)).

[51] In a footnote to its opinion in *Hodel,* the Court noted that a tenth amendment challenge to an action by Congress might not succeed, even if the three requirements for such a violation were met, if "the nature of federal interest advanced [is]. . . such that it justifies State submission." 452 U.S. at 288 n.29. In support of this proposition, the Court relied on Fry v. United States, 421 U.S. 542 (1975), wherein the Court upheld application of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, Title II 84 Stat. 799 (codified as amended at 12 U.S.C. § 1094 note (1976)), to freeze temporarily the wages of state and local government employees. The Act was passed "as an emergency measure to counter severe inflation that threatened the national economy." *Fry,* 421 U.S. at 548. In addition to being temporary in duration, the Act "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves," but, instead, "operated to reduce the pressures upon state budgets rather than to increase them." *National League of Cities,* 426 U.S. at 853.

The exact opposite is true of the 1976 Amendments. In enacting the Amendments, Congress made no finding that unemployment among state and local governments was at a level which had an impact on the nation as a whole. In fact, at the time of the passage of the 1976 Amendments unemployment at the state and local government level was only one percent. *See* Testimony of Dr. James D. Van Erden, Joint Appendix at 1133-34, *County of Los Angeles.* Moreover, the 1976 Amendments are not temporary, and, as discussed at 15-16 *supra,* have displaced state and local government choices as to how to structure their operations, have placed a severe burden on state and local treasuries, and have impaired the ability of state and local governments to provide services to their citizens.

Congress also failed to take into account that, by comparison, employees of state and local governments received greater fringe benefits than employees of private employers, and that these benefits

This Court recently reaffirmed the vitality of *National League of Cities,* particularly with regard to the relationship between state and local governments and their employees, in *Federal Energy Regulatory Commission v. Mississippi.*[52] In upholding certain provisions of the Public Utility Regulatory Policies Act of 1978[53] against a challenge based, in part, on the tenth amendment, the Court emphasized:

> We hold only that Congress may impose conditions on the State's regulation of private conduct in a preemptible area. This does not foreclose a tenth amend-

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were figured into the salaries paid state and local employees. *See* Wm. Coleman, Impacts of Unemployment Compensation Amendments of 1976 Upon Personnel Management in State and Local Governments 32-38 (1977), *Id.* at 462-468. Among the benefits state and local governments provided their employees were: pension and social security; paid vacations and sick-leave, including payment of accrued but unused vacations and sick-leave upon termination of employment; health insurance; unemployment compensation; long term disability benefits; death benefits; and educational expenses. *Id.* To impose on the States the additional requirement of providing unemployment compensation coverage on federally prescribed grounds, without consideration of the benefits state and local governments already provided their employees was unfair to state and local governments and upset the balances of equities which they had sought to establish. *Id.* The failure of Congress to account for these benefits further demonstrates that Congress lacked an adequate basis for passage of the 1976 Amendments.

In addition, Congress has indicated the absence of need to treat unemployment compensation uniformly throughout the nation by excluding federal employees from coverage of the FUTA. 26 U.S.C. § 3301, 3306(c)(6). Rather, Congress has provided unemployment compensation coverage to federal employees under a separate statute, 5 U.S.C. §§ 8501-8508, 8521-8525 (1976 & Supp. IV 1980), 5 U.S.C.A. §§ 8501-8508, 8521-8525 (West Supp. 1982). Under these circumstances, no emergency or compelling federal interest was or is advanced by the 1976 Amendments.

[52]456 U.S. ____, 102 S.Ct. 2126 (1982).

[53]Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of Titles 15, 16, 42, 43).

> ment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' . . . while providing 'those governmental services which [its] citizens require,' . . . as was the case in *National League of Cities.*[54]

Although the 1976 Amendments employ a somewhat different mechanism, they achieve the same result as did the amendments challenged in *National League of Cities,* i.e., direct interference by the federal government with the ability of state and local governments to structure relationships with their employees. In *National League of Cities,* the Court forbade such interference. If the 1976 Amendments are allowed to stand, Congress not only will have denied States the sovereignty reserved them by the tenth amendment, but also effectively will have overruled *National League of Cities.*

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[54]102 S. Ct. at 2142 n. 32 (quoting *National League of Cities,* 426 U.S. at 851, 847). The statutes at issue in *FERC v. Mississippi* as well as in *Hodel, National League of Cities,* and *Fry* were enacted pursuant to the powers granted Congress by the Commerce Clause. The FUTA, however, was an exercise of Congress' taxing power, *see* Charles C. Stewart Mach. Co. v. Davis, 301 U.S. 548, 581-82 (1936) (upholding the validity of title IX of the Social Security Act of 1935, Pub. L. No. 271, 49 Stat. 620, the predecessor of the FUTA), and spending power, N.H. Dept. of Employment Sec. v. Marshall, 616 F.2d at 245, U.S. Const. art. I, § 8, cl. 1.

In *National League of Cities,* the Court reiterated that it "has never doubted that there are limits upon the power of Congress to override state sovereignty even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art I of the Constitution." 426 U.S. at 842. Later in the opinion, the Court expressly noted that that it was not deciding "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art I, § 8, cl.1. . ." *Id.* at 852 n.17. The instant suit presents the Court with an ideal opportunity to answer this question, which was left open in *National League of Cities.*

### B. The 1976 Amendments Impose on State and Local Governments a Federal Tax, in Violation of the Doctrine of Intergovernmental Tax Immunity, and Subject to a Congressional Control State and Local Government Funds, and Thereby Deny the States a Republican Form of Government.

The immunity of the States from federal taxation was enunciated first in *Collector v. Day,*[55] wherein this Court held that Congress could not tax the salary of a state judicial officer. The Court reasoned that, because the tenth amendment reserves to the States an existence independent of the federal government and art. IV, § 4 guarantees the States a republican form of government,

> the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less deflated by the taxing power of another government which power acknowledges no limits but the will of the legislative body imposing the tax.[56]

This Court to some extent has narrowed the scope of the immunity of the States from federal taxation.[56] However, the reasoning of *Collector v. Day* remains fully applicable to any federal tax which would impair the ability of the States to perform traditional governmental functions, and the States retain their immunity from such a tax.[58]

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[55]78 U.S. (11 Wall.) 113 (1871).

[56]*Id.* at 125-26.

[57]*E.g.*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (overruling *Collector v. Day* as regards the immunity from taxation of the salaries of state and federal officers); Helvering v. Gerhardt, 304 U.S. 405 (1938).

[58]*See, e.g.*, Massachusetts v. United States, 435 U.S. 444, 458-60 (1978); *National League of Cities,* 426 U.S. at 842-43; New York v. United States, 326 U.S. 572, 582 (1945) (plurality opinion).

Congress was aware of the immunity from federal taxation accorded state and local governments when it passed the 1976 Amendments.[59] Just as it sought to circumvent *National League of Cities,* Congress also sought to circumvent the immunity of state and local governments from federal taxation.[60] Accordingly, state and local governments are exempted from the tax imposed on private employers by section 3301 of the FUTA.[61] By virtue of the 1976 Amendments, however, they indirectly are required pay this federal tax.

The FUTA specifies the amount of tax private employers must pay the federal government and the basis for determining this amount[62], but leaves to the States determination of the amount of unemployment compensation to be paid to former employees of private employers together with responsibility for raising the amounts necessary for payments of regular compensation.[63] Section 3302(a), however, provides that private employers only may credit against their federal tax amounts paid to a state unemployment fund. Therefore, by conditioning

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[59] Generally, mandatory Federal coverage under the Federal-State unemployment compensation program exists by virtue of applying the Federal unemployment payroll tax to the employment in question. . . . In the case of State and local government employment, however, such a procedure would raise questions of the power of the Federal Government under the Constitution to lay a tax upon a vital state function. Consequently, the bill would continue to exempt State and local employment from the federal tax but would require coverage for such employment as a condition of approving the State program.

Senate Report, *supra* note 3, at 8.

[60] *Id.*

[61] This was accomplished by excluding from the definition of employment service performed for state and local governments. 26 U.S.C. § 3306(c)(7).

[62] 26 U.S.C. §§ 3301, 3302.

[63] *See* 26 U.S.C. § 3304(a)(3), (4).

the federal tax credit on payments to the state fund, and by placing upon the States the full burden of paying regular unemployment compensation to former employees of private employers, Congress, in effect, has prescribed the minimum amount which States collect from private employers for payments to their former employees.[64] Because section 3304(a)(6)(A) requires former employees of state and local governments to receive the same amount of unemployment compensation as their private sector counterparts, Congress, effectively also has fixed the minimum amount state and local governments must raise for coverage of their employees.

All that Congress has left to state and local governments is their determination of how to finance this federally prescribed amount, which, of course, leaves them nothing. State and local governments must raise taxes and/or reduce services, the consequence of which is to create more unemployment among state and local employees.[65] Further, the amount which state

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[64]It makes little sense for a State to tax private employers at a rate which produces less than the amount of federal tax credit because the difference between any such lesser amount and the amount of the credit would be paid to the federal government rather than to the State, and would not provide a savings to private employers. In this regard, it is noteworthy that many States automatically conform their taxable wage base to the federal taxable wage base, S. Rep. No. 494, 97th Cong., 2d Sess. 377 (1982), and, at present, all States have a minimum taxable wage base of $6,000.00, Conf. Rep. No. 760, 97th Cong., 2d Sess. 653 (1982). Including those states with a taxable wage base in excess of $6,000.00, the average tax rate among the States is 2.4 percent. Conf. Rep. No. 760, 97th Cong., 2d Sess. 653 (1982).

[65]Testifying on the 1976 Amendments before the Senate Finance Committee, then Mayor of New York, Abraham Beame, stated:

> At the state benefit maximum of $95/week, for every one thousand employees laid off, we would incur an unemployment benefit obligation of $3,705,000. At an average salary plus benefits of $15,000, an additional 247 employees would have to be terminated to finance the Unemployment Insurance benefits for the first thousand-and an additional 61 employees to finance the UI benefits

and local governments must raise are subject to the whim of Congress. By amending the FUTA, as Congress has done recently in the Tax Equity and Fiscal Responsibility Act of 1982[66], Congress can increase the amount of revenue state and local governments must devote to coverage of their employees.

This is perhaps most dramatically illustrated by reference to the Extended Compensation Act, which is incorporated into the FUTA as a condition of certification.[67] As discussed at 6 n. 9 and 16 n. 48 *supra*, each State must pay extended unemployment compensation benefits during periods of high unemployment in the State. Section 204 of the Act provides that the federal government will pay one half of the extended benefits payable to former private sector employees but none of the extended benefits payable to former employees of state and local governments. Section 203 sets forth the rates of unemployment which make extended benefits payable,[68] as well as the duration of these payments. By simply changing the level of unemployment which activates the extended benefit period and/or the duration of this period, Congress can increase the

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> of the 247. Thus, one additional worker will face the loss of his or her job for every three laid off to meet budget requirments.
>
> The meaning of this cruel arithmetic is that H.R. 10210 [the 1976 Amendments] would add to the unemployment problem in the very areas where joblessness already has become critical. In that regard, the bill undermines the aims of the recently enacted Public Works Employment Act and other programs targeted to assist economically depressed areas.

*Unemployment Compensation Amendments of 1976: Hearings on H.R. 10210 Before the Senate Comm. on Finance*, 94th Cong., 2d Sess. 142 (1976).

[66]Pub. L. No. 97-248, §§ 193, 271-273, 276-277, 96 stat. 324, 408-09, 554-57, 558-59.

[67]26 U.S.C. § 3304(a)(11).

[68]No distinction is drawn between public and private sector unemployment.

amount states and local governments must raise to finance extended benefit coverage.

The potentially devasting consequences to state and local governments of Congress' control over their funds are readily apparent. State and local governments are rendered incapable of planning their budgets adequately because their budgets are placed at the mercy of Congress' taxing power. Further, state and local governments are likely to find themselves repeatedly in the position of having to choose between foregoing governmental services and programs and further taxing their citizens. These are the type of consequences which led Chief Justice Marshall in *McCullough v. Maryland*[69] to state that "the power to tax involves the power to destroy."[70]

A further indication that the 1976 Amendments constitute a federal tax on state and local governments is seen in the requirement that, once funds are raised for the coverage of state and local employees, they must be paid immediately to the Secretary of the Treasury for credit to the federal Unemployment Trust Fund.[71] Once paid, these funds are comingled with, and subjected to congressional restrictions on their disposition together with, funds derived from federal and state unemployment taxes on private employers.[72]

Under these circumstances there is no question that the 1976 Amendments impose a federal tax on state and local governments, which, in the case of petitioner, has impaired its ability to perform traditional governmental functions. If Congress is able to avoid the immunity of state and local governments from

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[69]17 U.S. (4 Wheat.) 316 (1819).

[70]*Id.* at 431.

[71]26 U.S.C. § 3304(a)(3).

[72]*See, e.g.*, 26 U.S.C. § 3304(a)(3), (4); 42 U.S.C. §§ 502(a), 503(a), 1101(b)(1), 1104(a). Additionally, U.S. Const. art. I., § 9, cl. 7 prohibits money from being withdrawn from the Treasury except "in Consequence of Appropriations made by Law."

federal taxation by the simple expedient of not labeling as a tax moneys which these governments must pay to the federal government, Congress will have eliminated the federal tax immunity of state and local governments. Nothing could more threaten the Constitution's guarantee of a republican form of government than to deny state and local governments their immunity from federal taxation and allow Congress exclusive power to spend state and local government funds.[73] The 1976 Amendments represent such a threat.

## IV. Neither *Res Judicata* nor Collateral Estoppel Bars Consideration of the Important Issues Presented By This Suit.

As discussed previously, at 9 *supra*, the district court dismissed petitioner's complaint, and the Ninth Circuit affirmed, holding that the opinion of the District of Columbia Circuit in *County of Los Angeles v. Marshall* provided the basis for ap-

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[73] Just as imposition of the federal tax deprives the States of a republican form of government, so too do federally mandated requirements that state and local governments pay unemployment compensation to their employees and that the funding for this compensation come from state and local governments. This is well illustrated by Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), *vacated as moot sub nom.* Environmental Protection Agency v. Brown, 431 U.S. 99 (1977), wherein the Ninth Circuit concluded:

> A structure in which all power on the part of the states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government. Nor could such an assertion be made were all taxation and expenditure responsibility to reside in the Federal government.

521 F.2d at 840. This quotation provides an apt description of the plight in which the States find themselves as a result of 1976 Amendments, and remains fully applicable even if the 1976 Amendments somehow are not considered a federal tax.

plication of *res judicata* to petitioner's claims for declaratory and injunctive relief and collateral estoppel to petitioner's claim for a tax refund.

The doctrines of *res judicata* and collateral estoppel may be applicable where a court of competent jurisdiction has rendered a decision on the merits of a controversey, and the parties to that controversy, or those in privity with them, then seek to relitigate either the same cause of action, in the case of *res judicata,* or a particular issue, in the case of collateral estoppel, in a subsequent action.[74] An additional prerequisite to the applicability of these doctrines is that the party against whom either is to be applied must have "had a full and fair opportunity to litigate" the cause of action or issue.[75] Even under these circumstances, however, neither *res judicata* not collateral estoppel need be applied where an important public policy is in issue or manifest injustice would result.[76] These guidelines counsel strongly against application of *res judicata* and collateral estoppel in the instant suit.

Unlike this case, *County of Los Angeles* was filed prior to the effective date of the 1976 Amendments, and, even though petitioner was a party to that suit, it was one of more than 1750 individual plaintiffs. Further, in its brief *per curiam* opinion, the District of Columbia Circuit declined to address the merits of

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[74]Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 150, 153 (1979); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 426 (1955).

[75]Kremer v. Chemical Constr. Corp., 456 U.S. ____, ____ & n. 22, 102 S.Ct. 1883, 1897 & n. 22 (1982); Montana v. United States, 440 U.S. at 153.

[76]Garner v. Giarruso, 571 F.2d 1130, 1336 (5th Cir. 1978); United States v. LaFatch, 565 F.2d 81, 83-84 (6th Cir. 1977), *cert. denied sub nom.* LaFatch v. MM Corp., 435 U.S. 971 (1978); Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951) (principle set forth in context of *res judicata*).

plaintiffs' suit.[77] Instead, the court determined that the opinion of the First Circuit in *New Hampshire Department of Employment Security v. Marshall* was applicable to plaintiffs' case and therefore, adopted its reasoning.[78] The court justified this approach by reasoning that the "same challenge had been made by the State of New Hampshire Department of Employment Security" and that such an approach was "in the interest of inter-circuit harmony."[79]

Petitioner was not a party to the *New Hampshire* case. Although petitioner and the other *County of Los Angeles* plaintiffs had sought party status, the First Circuit dismissed them as parties for lack of jurisdiction under section 3310(a) of the FUTA.[80] Further, *New Hampshire* arose from a procedural set-

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[77]The court also did not address either the Memorandum Opinion of the district court denying plaintiffs' motion for a preliminary injunction on the grounds that the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), apparently barred the relief plaintiffs sought, County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1188-89 (D.D.C. 1977), *aff'd, 631 F.2d 767 (D.C. Cir.) cert. denied,* 449 U.S. 837 (1980) (21a), or the subsequent Order of the district court dismissing *sua sponte* plaintiffs' complaint for lack of subject matter jurisdiction under the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201 (1976) and the Anti-Injunction Act, County of Los Angeles v. Marshall, Civ. Act. No. 77-2023, typescript op. at 2-3 (D.D.C. Mar. 7, 1978). *aff'd,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (16a; the Memorandum Opinion and subsequent Order are reprinted in Appendix C at 17a and 14a). The ninth Circuit, similarly, declined to review the applicability of these Acts. *City of Burbank,* no. 80-5548, typescript op at 4. (5a.)

[78]631 F.2d at 769. (12a.)

[79]*Id.* at 768. (11a.)

[80]616 F.2d at 249. (50a.) Petitioner and the other *County of Los Angeles* plaintiffs did file a brief as *amici curiae.* They also participated in the oral argument before the First Circuit, but only were allowed to argue for that part of the 30 minute argument not used by the parties, the State of New Hampshire and the State of New Hampshire Department of Employment Security, both of which argued separately. However, because *amici curiae* are not bound by the judgment of the court, the status as *amici curiae* does not provide a basis for application of *res*

ting entirely different from either the instant suit or *County of Los Angeles. New Hampshire* was an administrative proceeding brought by the Secretary of Labor to determine whether New Hampshire's unemployment compensation law was in conformity with the FUTA as amended.

The Secretary of Labor concluded that New Hampshire's law did not conform with the FUTA in six respects, only two of which implicated the tenth amendment.[81] Even though the State of New Hampshire contended that the case was moot,[82] and the statutory violations alone warranted decertification by the Secretary,[83] the First Circuit addressed the issue of whether the 1976 Amendments violated the tenth amendment, and held that there was no such violation.[84] However, the court did not

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*judicata* or collateral estoppel. Brown–Crummer Inv. Co. v. Paulter, 70 F.2d 184, 186 (10th Cir. 1934); 1B J. Moore, T. Currier, Moore's Federal Practice ¶.411[6], at 1551-52 (2d ed. 1982); *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) (declining to consider arguments raised by *amicus curiae* but not raised by the parties).

[81] 616 F.2d at 245. (41a.)

[82] *Id.* at 243 n. **. (36a.) New Hampshire based this argument on the legislature's enactment of an act designed to bring New Hampshire's unemployment compensation law into conformity with the 1976 Amendments. The court, however, determined that the case was not moot. *Id.*

[83] *Id.* at 249 (Campbell, J. concurring) (dissenting from the majority's consideration of the constitutional issues). (51a.)

[84] *Id.* at 249. In reaching this conclusion, the court discounted the import of *Nation League of Cities*, and, instead, relied upon Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and Carmichael v. S. Coal Co., 301 U.S. 548 (1937). Although in *Steward* and *Carmichael* this Court concluded that Title IX of the Social Security Act of 1935, Pub. L. No. 271, 49 Stat. 620, the predecessor of the FUTA, did not coerce the States in violation of the tenth amendment, that Act did not require the states to extend unemployment compensation coverage to state and local employees. Accordingly, no State or political subdivision thereof was a plaintiff in either *Steward or Carmichael*. It hardly warrants mentioning that private parties do not have the same status, for purposes of standing, as do States and their political subdivisions

address the larger Federalism issue including both the intergovernmental tax immunity and the republican form of government issues. Accordingly, the opinion in *County of Los Angeles* cannot possibly be construed as addressing these issues even though they were raised by petitioner and the remaining plaintiffs.[85]

In view of the above, it is apparent that no court has passed on the merits of this petitioner's challenge to the 1976 Amendments. Application of either *res judicata* or collateral estoppel to the instant suit, therefore, is unwarranted, particularly with respect to petitioner's claims that the 1976 Amendments violate its immunity from federal taxation and denies California a republican form of government. Petitioner raised these issues in this suit[86] but, again, the courts left them unreviewed.

Finally, even to the extent that *res judicata* and/or collateral estoppel may be applicable, there are compelling reasons why they should not be applied in this suit. As discussed at 26 *supra,* courts have refused to apply these doctrines where either important public policies are in issue or manifest injustice would result. In *County of Los Angeles,* the district court characterized the litigation as being of "monumental significance."[87] Indeed, the issues presented by this suit and *County of Los Angeles* go to the heart of this country's form of government. The importance of these issues advises against the slavish application of *res judicata* or collateral estoppel. This is especially true in light of the failure of any court to render a

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for purposes of challenging a statute on tenth amendment or Federalism grounds. Therefore, the First Circuit erred in relying on *Steward* and *Carmichael.* Because the District of Columbia Circuit adopted the First Circuit's opinion, the District of Columbia Circuit's opinion also was based erroneously on *Steward* and *Carmichael.*

[85] *See* Compl. ¶ 17 (Joint Appendix at 21), Joint Brief of Appellants at 61-65, *County of Los Angeles.*

[86] *See* Compl. ¶ 10 (80a), Opening Brief of Appellant at 41-42.

[87] 442 F. Supp. at 1187 (D.D.C. 1977). (18a.)

decision on the merits of this petitioner's claims. For courts to refuse to consider the constitutional issues raised by one of the few laws requiring state and local governments to pay a federal tax and to surrender to the federal government control over their funds and traditional governmental functions and decisions is to decline review of among the most important issues for which courts were created and for which they have earned a unique esteem in this country's system of government. The effect of this refusal has been to deny petitioner its day in court.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted

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CITY OF BURBANK

## APPENDIX A

**Memorandum of the United States Court of Appeals for the Ninth Circuit in *City of Burbank v. United States*, No. 80-5548 (9th Cir. July 6, 1982), Affirming the District Court's Dismissal of the Complaint.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
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| CITY OF BURBANK, a municipal corporation and political subdivision of the State of California; | ) | No. 80-5548 |
| Plaintiff-Appellant, | ) | DC No. 80-00205 |
| v. | ) | |
| UNITED STATES OF AMERICA, THE HONORABLE RAYMOND J. DONOVAN,* Secretary of Labor of the United States, THE HONORABLE DONALD R. REGAN,* Secretary of the Treasury of the United States, THE HONORABLE ROSCOE L. EGGER,* Commissioner of Internal Revenue Service of the United States, | ) | MEMORANDUM |
| Defendants-Appellees. | ) | |

FILED JUL 6 1982
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

*Raymond J. Donovan, Donald T. Regan, and Roscoe L. Egger are substituted for their predecessors pursuant to Federal Rule of Appellate Procedure 43(c).

Appeal from the United States District Court
for the Central District of California
Malcolm M. Lucas, District Judge, Presiding
Argued and Submitted November 4, 1981

Before: CHOY and ANDERSON, Circuit Judges, and KEEP,** District Judge.

The City of Burbank (Burbank) challenges the constitutionality of the 1976 Amendments to the Federal Unemployment Tax Act (FUTA), Pub. L. No. 94-566, 90 Stat. 2667 (1976), seeking a tax refund and related declaratory and injunctive relief. Burbank contends that the 1976 FUTA Amendments unconstitutionally coerced California into extending its unemployment compensation coverage to state and local government employees, and into imposing a tax on Burbank and other government employers to fund the costs of such coverage.

The district court dismissed Burbank's complaint as barred by res judicata. The dismissal was based on Burbank's participation as one of a number of plaintiffs in *County of Los Angeles v. Marshall,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980).[1] In *County of Los Angeles,* Burbank, along with a large number of states and political subdivisions, challenged the constitutionality of the 1976 FUTA Amendments seeking declaratory and injunctive relief. As in Burbank's present suit, the plaintiffs' argued that the 1976 FUTA Amendments unconstitutionally

**The Honorable Judith N. Keep, District Judge for the Southern District of California, sitting by designation.

[1]The district court also relied upon Burbank's participation as an *amicus curiae* in the prior case of State of New Hampshire Department of Employment Security v. Marshall, 616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied*, 449 U.S. 806 (1980). We need not discuss the effect of that case on the present action because *County of Los Angeles* is dispositive.

coerced the states into enacting conforming legislation. The District of Columbia Circuit rejected the plaintiffs' constitutional arguments and upheld the 1976 FUTA Amendments. *Id.* at 796.

We hold that the District of Columbia Circuit's decision in *County of Los Angeles* provides the basis for the application of res judicata to bar Burbank's claim for declaratory and injunctive relief and the application of collateral estoppel to bar Burbank's claim for tax refund. We therefore affirm the district court's dismissal of Burbank's complaint.

## I. The Bar of Res Judicata and Collateral Estoppel

The doctrines of res judicata and collateral estoppel are central to the conclusive resolution of civil disputes. *Montana v. United States,* 440 U.S. 147, 153 (1979). By precluding the relitigation of settled claims and issues, these doctrines serve to conserve judicial resources, foster reliance on judicial decisions by minimizing the possibility of inconsistent determinations, and protect parties against the expense of repetitive litigation. *Id.* at 153-54. Under res judicata, a final judgment on the merits is an absolute bar to a subsequent action between the same parties upon the same claim or cause of action. *Id.* at 153. Under collateral estoppel, once an issue has been actually and necessarily determined, that determination is conclusive and the issue cannot be relitigated in a subsequent suit between the same parties. *Id.*

The *County of Los Angeles* case provides the basis of the application of res judicata and collateral estoppel to bar Burbank's complaint. Contrary to Burbank's contention, the District of Columbia Circuit's decision in *County of Los Angeles* was on the merits. Although the district

court dismissed the case on jurisdictional grounds, the District of Columbia Circuit's decision on the merits controls the res judicata and collateral estoppel effect given to the *County of Los Angeles* case. 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶. 416[2] (2d ed. 1980).

Burbank's argument that the *County of Los Angeles* decision did not actually and necessarily determine the constitutional issues raised by Burbank's present complaint is also unavailing. Burbank in the present case raises the same issues of unconstitutional coercion it and the other plaintiffs raised in *County of Los Angeles.* Burbank, in fact, admits that the legal basis for its present complaintis the same as the legal basis for the complaint in *Count of Los Angeles.*[2] In upholding the 1976 FUTA Amendments on the merits, the District of Columbia Circuit in *County of Los Angeles* must therefore have actually and necessarily determined the constitutional issues Burbank raises here. Those determinations, which reject Burbank's constitutional contentions, are by operation of collateral estoppel conclusive, and preclude relitigation of the issues in the present case.

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[2]In its memorandum in opposition to the defendants' motion to dismiss in the court below, Burbank states: "The gravamen of the Plaintiff's action is alleged in detail in the complaint filed in *County of Los Angeles v. Marshall.*" In addition, in its claims for tax refund made to the IRS prior to the present suit, Burbank states: "The legal basis for this claim is stated in greater detail in the complaint filed in *County of Los Angeles v. Marshall.*"

## II. Conclusion

Burbank's claim for declaratory and injunctive relief is identical to that raised in *County of Los Angeles* and is properly barred by res judicata. Burbank's claim for tax refund constitutes a different cause of action from the claim for declaratory and injunctive relief. Because *County of Los Angeles* did not involve a claim for tax refund claim. However, since Burbank's claim for tax refund raises the same constitutional issues that were determined in *County of Los Angeles,* the claim is properly barred by collateral estoppel.

Because we hold that Burbank's complaint is barred by res judicata and collateral estoppel, we decline Burbank's invitation to examine the merits of its constitutiional arguments. We also avoid reaching the Government's complex jurisdictional defense. The District Court's dismissal of Burbank's complaint is AFFIRMED.

## APPENDIX B

**Order of Dismissal of the District Court in *City of Burbank v. United States*, No. 80-00205 MML (GX) (C.D.Cal. June 20, 1980).**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,

Plaintiff

v.

UNITED STATES OF AMERICA, et al.,

Defendants

No. 80-00205 MML (GX)
ORDER OF DISMISSAL

The court having reviewed the pleadings and other papers filed in this Cause, including the defendants' Motion to Dismiss, and the arguments of counsel having been heard at a hearing held in this Cause on June 16, 1980, and the Court being of the opinion (1) that the holdings of the First Circuit Court of Appeals and of the District of Columbia Court of Appeals in the respective opinions of *Department of Employment* v. *Marshall*,616 F.2d 240 (C.A. 1, 1980) and *County of Los Angeles* v. *Marshall*, Nos. 77-2138, 78-1142, 78-1232, 78-1275, 78-1311, and 77-2023, decided March 19, 1980, are res judicata as to the claims advanced by the plaintiff, City of Burbank, and (2) that the reasoning of the afore-mentioned opinions is persuasive and operative as res judicata against the plaintiff, City of Burbank,

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Complaint of the plaintiff, City of Burbank, should be and hereby is DISMISSED WITH PREJUDICE, the parties to bear their own costs.

IT IS SO ORDERED.

/s/ Malcoln M. Lucas
United States District Judge

Date: June 20, 1980

## APPENDIX C

**Opinions and Orders in Related Cases.**

1. **Opinion of the United States Court of Appeals for the District of Columbia Circuit in *County of Los Angeles v. Marshall*, 631 F.2d 767 (D.C. Cir. 1980), Affirming the District Court's Dismissal of the Complaint.**

**The COUNTY OF LOS ANGELES CALIFORNIA, a Political Subdivision of the State of California et al., Appellants,**

**v.**

**The Honorable F. Ray MARSHALL, Secretary of Labor of the United States et al.**

**The COUNTY OF LOS ANGELES, CALIFORNIA, a Political Subdivision of the State of California et al., Louisiana Municipal Association et al., Appellants,**

**v.**

**The Honorable F. Ray MARSHALL, Secretary of Labor of the United States et al., (two cases).**

**The COUNTY OF LOS ANGELES CALIFORNIA, a Political Subdivision of the State of California, the State of South Carolina, the State of Alaska et al, Appellants,**

**v.**

**The Honorable F. Ray MARSHALL, Secretary of Labor of the United States et al.**

**The COUNTY OF LOS ANGELES, CALIFORNIA, a Political Subdivision of the State of California, the State of South Carolina, the State of Alaska et al., the State of Utah, Appellant,**

**v.**

**The Honorable F. Ray MARSHALL, Secretary of Labor of the United States et al.**

**Nos. 77-2138, 78-1142, 78-1232, 78-1275 and 78-1311.**

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 14, 1979.
Decided March 19, 1980.
Certiorari Denied Oct. 6, 1980.
See 101 S.Ct. 113.

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Appeal from the United States District Court for the District of Columbia (D.C. Civil No. 77-2023).

William S. Rhyne, Washington, D.C., with whom Charles S. Rhyne, Martin W. Matzen and David V. Anthony, Washington, D.C., were on the brief, for appellants, County of Los Angeles et al.

Calvin L. Rampton, Salt Lake City, Utah, a member of the bar of the Supreme Court of Utah, was allowed to argue (pro hac vice), for appellants, County of Los Angeles et al.

Robert T. Duffy, Atty., Dept. of Justice, Washington, D.C., with whom M. Carr Ferguson, Asst. Atty. Gen., Gilbert E. Andrews and Leonard J. Henzke, Jr., Attys., Dept. of Justicie, Washington, D.C., were on the brief for appellee, Dept. of Justice.

George Kaufman, Washington, D.C., with whom were on the brief, Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., Lansing, Mich., E.J. Setlock, Asst. Atty. Gen., Detroit, Mich., for the State of Mich., A.L. Zwerdling, Janet Kohn, Washington, D.C., for A.F.S.C.M.E., J. Albert Woll, Gen. Counsel, AFL–CIO, Laurence Gold, Sp. Counsel, AFL-CIO, Edward J. Hickey, Jr., Gen. Counsel, Public Emp. Dept., AFL–CIO, Washington, D.C., for the AFL–CIO.

Donald A. Carr, Peter B. Archie, Michael A. Nemeroff, Frederick Simpich. Thomas A. Shannon, August W. Steinhilber, Washington, D.C., and John J. Gunther, were on the brief, for amici curiae of the International City Management Ass'n, National Ass'n of Counties, National League of Cities, National School Boards Ass'n, and the U.S. Conference of Mayors, in support of the position of appellant, County of Los Angeles, et al.

Frederick Simpich, Thomas A. Shannon and August W. Steinhilber, Washington, D.C., were on the brief for International Personnel Management Ass'n and Nat. School Boards Ass'n as amicus curiae.

Before McGOWAN, LEVENTHAL* and ROBB, Circuit Judges.

Opinion PER CURIAM.

PER CURIAM:

In these consolidated appeals a number of states and political subdivisions have challenged, on constitutional

*Circuit Judge Leventhal was a member of the panel which considered this case but died before the opinion was issued.

grounds, the failure of the District Court to afford them the injunctive and declaratory relief sought by them with respect to the 1976 amendments to the Federal Unemployment Tax Act (FUTA). These amendments extended the reach of that Act to the employees of state and local governments. Pub.L. No. 94-566, 90 Stat. 2667 (1976).

The constitutional objections asserted by appellants derive from the Tenth Amendment, and their reliance is upon *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). In that case the Supreme Court invalidated, as in contravention of the Tenth Amendment, the extension by the Congress of the Fair Labor Standards Act to the employees of state and local governments.

The first line of defense interposed by the federal appellees was that the strictures of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), and the tax exception provisions of the Declaratory Judgment Act, 28 U.S.C. 2201-2202, operated to foreclose the relief sought. The District Court so held, and did not reach the constitutional claim. On appeal, this holding was attacked as erroneous, and the constitutional challenge was renewed.

As early as the oral argument before us, it appeared that this same challenge had been made by the State of New Hampshire Department of Employment Security in an administrative proceeding involving the decertification by the Secretary of Labor of New Hampshire's conformity to FUTA as amended, and that it was being pressed in a review of that proceeding pending before the United States Court of Appeals for the First Circuit. 26 U.S.C. § 3310. In the interest of inter-circuit comity and the concomitant husbanding of scarce judicial resources, this court concluded to await the disposition to be made of the constitu-

tional claim by the First Circuit – a disposition which did not implicate the substantial preliminary questions confronted by this court by reason of the Anti-Injunction and Declaratory Judgment Acts.

The First Circuit's decision was delayed by the representations of the parties that settlement negotiations were proceeding. Those negotiations having at length proved abortive, the First Circuit has now decided the case. *State of New Hampshire Department of Employment Security v. Marshall,* 616 F.2d 240 (1980). In addition to sustaining the Secretary's decertification of New Hampshire as not conforming in certain respects with FUTA, the First Circuit addressed the Tenth Amendment contention and concluded that it was unavailing. We agree with the constitutional determination so made by the First Circuit, and adopt its reasoning as fully applicable to the consolidated appeals before us.[1]

That reasoning – correctly, we think – rests upon the proposition that *Usery,* involving a mandatory imposition

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[1]There were six particulars in which the Secretary found New Hampshire to be non-conforming, only two of which were related to state and local employees. Because the court sustained the Secretary as to all of them, Judge Campbell did not think it necessary to reach the constitutional issue. The majority, however, pointed out that, in the administrative proceeding, New Hampshire introduced virtually no evidence on conformity but rather focused on its constitutional claim. Indeed, it advised the First Circuit in brief that it was not in conformity "because of its refusal to amend its law to accommodate the unconstitutional public sector program financing requirements." As to the four non-conformity findings limited to the private sector, New Hampshire asserted to the court that it recognized the necessity for it to conform but it understood that the Secretary had waived these requirements pending resolution of the constitutional issue. The court found no such waiver, but since the constitutional claim involving the public employees seemed to the majority to be at the heart of a controversy which sorely needed to be laid to rest, it thought it best to decide it.

on state and local governments bottomed upon the commerce clause, is wholly distinguishable, and diminishes in no way the authority of *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937) – the case which upheld the scheme of federal-state cooperation founded upon the spending power and embodied in FUTA as it was originally enacted. The voluntary and wholly optional aspect of that scheme persists in full measure under the 1976 amendments, and serves to defeat the contentions advanced by appellants of coercion and improper transgression upon the sovereignty of the state shielded by the Tenth Amendment.

In following the course we have, we think it relevant to note that counsel for appellants in this case participated in the First Circuit review proceeding as counsel for petitioners, and also for the *amici curiae,* one of which was the County of Los Angeles, a principal appellant before us. Of that *amicus,* the First Circuit said that "it has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle."

The judgment of the District Court dismissing the complaint is affirmed.

*It is so ordered.*

**2. Order of the District Court in *County of Los Angeles v. Mashall*, Civ. Act. No. 77-2023 (D.D.C. Mar. 7, 1978), Dismissing *Sua Sponte* Plaintiffs' Complaint.**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNTY OF LOS ANGELES, CALIFORNIA;
THE STATE OF SOUTH CAROLINA, et al.,
Plaintiffs,

LOUISIANA MUNICIPAL ASSOCIATION,
CITY OF NEW ORLEANS, LOUISIANA, et al.
Plaintiff-Intervenors,

v.

HONORABLE F. RAY MARSHALL, Secretary United States Department of Labor, et al.
Defendants,

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AMERICAN FEDERATIONS OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
Defendant-Intervenors.

C.A. No. 77-2023

FILED
MAR 7 1978
JAMES F. DAVEY, Clerk

ORDER

This case having come on for a status call on January 24, 1978, which hearing began on that date and was continued over to January 25, 1978, and the parties having appeared through their counsel, and from the statements and arguments of counsel, the pleadings, and the papers filed

herein concerning the plaintiffs' motion for preliminary injunction which this Court denied on December 29, 1977, and the papers filed concerning the cross-motions for summary judgment, and the entire record in this case, this Court concludes that there exists a sharp and substantial factual conflict between the parties concerning the actual impact of the challenged statutory amendments upon the plaintiffs and the other various states and political subdivisions. It further appears that counsel for the Governmental defendants did reiterate its argument presented to this Court in opposition to the plaintiffs' motion for a preliminary injunction to the effect that this Court lacked jurisdiction over this action, and it further appearing that this Court did deny plaintiffs' motion for a preliminary injunction on various grounds, including jurisdictional grounds, as is set forth in this Court's eleven page Memorandum Opinion and Order of December 29, 1977, denying the plaintiffs' motion for a preliminary injunction, and this Court being of the opinion that the parties hereto have offered no new arguments which would cause this Court to change or modify its Memorandum Opinion dated December 29, 1977, this court is of the opinion that its conclusions of law embodied in that Opinion of December 29, 1977, are dispositive of the issue as to this Court's jurisdiction to hear this case as follows:

The Court, in its Memorandum Opinion, denied the motion for a preliminary injunction ruling that there was no substantial likelihood of plaintiffs' success on the legal merits of the plaintiffs' case because of the Supreme Court's ruling in *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), and the inapplicability of *National League of Cities v. Usery,* 426 U.S. 883 (1976) (see Memorandum Opinion, pp. 6-9), and on the grounds that the statute here in question is clear and unambiguous on its face and as a

matter of law is optional and not mandatory with respect to the states and therefore cannot, as a matter of law, constitute a violation of the Tenth Amendment to the Constitution; and it is therefore the opinion of the Court that, indeed, *Steward Machine, supra,* is controlling and would require a dismissal on the merits as a matter of law.

However, it is not necessary to reach either the legal merits or the factual merits of this case, nor to resolve the very substantial factual questions raised by the pleadings and the discovery papers both filed and proposed, since the Court concludes that it is deprived of subject matter jurisdiction by the terms of the Anti-Injunction Act, Section 7421(a) of the Internal Revenue Code of 1954 (Memorandum Opinion, pp. 4 and 5), and the Declaratory Judgment Act, 28 U.S.C. § 2201.

Accordingly, in the interest of judicial economy, this Court is *sua sponte* dismissing the action at this time on the foregoing legal grounds and is hereby deferring and terminating any further discovery and trial proceedings on the aforesaid substantial issues of fact, which discovery and trial proceedings would, of course, be resumed upon the eventuality that this Court's order of dismissal is set aside in appropriate proceedings either by this Court or by a final order of an appellate court. Accordingly, it is, by the Court, this 7th day of March, 1978,

ORDERED, that, in accordance with the Memorandum Opinion issued on December 29, 1977, the instant action be, and the same hereby is, dismissed.

/s/ Charles R. Richey
United States District Judge

**3. Memorandum Opinion of the District Court in *County of Los Angeles v. Marshall,* 442 F.Supp. 1186 (D.D.C. 1977), Denying Plaintiffs' Motion for a Preliminary Injunction.**

**COUNTY OF LOS ANGELES, CALIFORNIA, and the State of South Carolina, et al.,**
**Plaintiffs,**

**Louisiana Municipal Association, City of New Orleans, Louisiana, et al.,**
**Plaintiff-Intervenors,**

**v.**

**Honorable F. Ray MARSHALL, Secretary United States Department of Labor, Honorable W. Michael Blumenthal, Secretary, United States Department of Treasury, Honorable James Kurtz, Commissioner of Internal Revenue Service of the United States, Defendants,**

**American Federation of State, County an Municipal Employees, American Federations of Labor and Congress of Industrial Oreganizations. Defendant-Intervenors.**

**Civ. A. No. 77-2023.**

United States District Court,
District of Columbia.
Dec. 29, 1977.

Charles S. Rhyne, William S. Rhyne, Martin W. Matzen, Stephen P. Elmendorf, Washington, D.C., for plaintiffs.

David V. Anthony, Gregory A. Smith, Washington, D.C., R. Gordon Kean, Jr., William R. D'Armond, G. William Jarman, Baton Rouge, La., for plaintiff-intervenors.

John J. McCarthy, Richard A. Schully, William L. Shraberg, Dept. of Justice, Washington, D.C., for defendants.

A. L. Zwerdling, Janet G. Kohn, Larry P. Weinberg, J. Albert Woll, Laurence Gold, Washington, D.C., for defendant-intervenors.

## MEMORANDUM OPINION

CHARLES R. RICHEY, District Judge.

This case is before the Court on a motion of over 1200 plaintiffs (seven states and the rest, political subdivisions) and plaintiff-intervenors, the Louisiana Municipal Association and seventy-four Louisiana Municipalities, for a preliminary injunction to enjoin the defendants from implementing the Unemployment Compensation Amendments of 1976. These Amendments would require the state and local governments to finance unemployment benefits for these governments' former employees. This litigation is of monumental significance because the allegations indicate that the denial of the injunction may result in the firing of 100,000 state and local government employees and possibly the curtailment of some vital government services, while the granting of the injunction may result in some 2 million state employees and hundreds of thousands of local government employees being unable to obtain unemployment compensation should they become unemployed.

For the reasons hereinafter stated, the Court will deny

the motion for a preliminary injunction. Upon consideration of all the memoranda filed, the affidavits, and the lengthy hearing held on the motion, the Court, under Fed.R.Civ.P. 52(a) and 65(d), makes the following findings of fact and conclusions of law.

## I. FINDINGS OF FACT

1. Plaintiffs challenge the requirements of Pub.L.No. 91-373 and Pub.L.No. 94-566, as amended by Pub.L.No. 95-19 ("challenged Amendments") which require that plaintiffs, beginning January 1, 1978, assume the financing of unemployemnt benefits for their former employees. Plaintiffs assert that these statutes trespass upon the state's sovereignty in violation of the tenth amendment to the Constitution.

2. Plaintiffs remain, even under the challenged amendments, immune from the Federal unemployment paroll tax, 26 U.S.C. § 3301.

3. However, failure of state and local governments beginning January 1, 1978 to enact conforming legislation approved by the defendant Secretary of Labor, 26 U.S.C. § 3304, results in the denial of a tax credit, 26 U.S.C. §§ 3301, 3302, against the Federal unemployment payroll tax – collected by the defendant Commissioner of Internal Revenue – on private employers within a nonconforming state.

4. The state must, under the challenged amendments, forward funds to the defendant Secretary of the Treasury to be held in the Federal Unemployment Trust Fund.

5. Beginning January 1, 1978, plaintiffs may, if they enact conforming legislation, need to set aside tax payments or accrue reserves against reimbursements to

finance unemployment compensation benefits for plaintiffs' former government employees; however, any liability for weeks of unemployment prior to July 1, 1978 will be reimbursed by the federal government, 26 U.S.C. § 3304 note.

6. Plaintiff states and local governments often have reached limits set by state constitutions and statutes on incurring new debts and raising new revenues through taxes. If states do enact conforming legislation, these limits *may* induce the states and local governments to raise the needed revenue by curtailing or eliminating government services and by firing government employees. To prevent this, plaintiffs seek this injunction.

7. The issuance of an injunction will injure public employees who may become eligible for unemployment compensation; they will be injured to the extent that state and local laws do not provide for them because the Special Unemployment Assistance program, 26 U.S.C. § 3304 note, by which the federal government has paid for the unemployment compensation of these employees since 1975, will expire on December 31, 1977.

8. Several of the states – most prominently plaintiff State of New Hampshire – have not enacted conforming legislation. The other plaintiff states have enacted legislation which purports to conform to the federal requirements.

9. The consequence – unless an injunction is granted – of a state's failure to enact conforming legislation, is (a) denial of a tax credit against the Federal unemployment payroll tax levied on private employer Federal taxpayers within these nonconforming states, 26 U.S.C. § 3301, 3302; (b) shifting of the expenses of administering the state unemployment compensation law to the state treasury;

and (c) termination of the present federal reimbursement of one-half of extended benefits (benefits paid to claimants from the 27th through 39th weeks of unemployment).

## II. CONCLUSIONS OF LAW

Prior to discussing the four factors to be considered in determining whether a preliminary injunction should be issued, the Court must first decide whether it even has jurisdiction over this litigation.

[1] It appears to the Court at this point in the litigation that the Anti-Injunction Act may bar this action. The Act, 26 U.S.C. § 7421(a), reads in relevant part:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The Supreme Court has stated that the terms of this Act are to be given "almost literal effect." *Bob Jones University v. Simon*, 416 U.S. 725, 737, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974). Thus far, only two exceptions to the Act have been recognized: (1) the Act does not apply if it is clear that under no circumstances could the Government prevail and equity jurisdiction otherwise exists, *see Enochs v. Williams Packing Co.*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961); (2) the Act does not apply when there is no access to judicial review, *see Investment Annuity, Inc. v. Blumenthal*, 77-2 U.S.T.C. 88,441, 88,442 (Nov. 9, 1977).

[2-5] In this suit, plaintifffs seeks to restrain the defendants from assessing or collecting a tax from the private employers in the nonconforming states. The refusal of a

state to enact the conforming legislation would result in the denial of a tax credit to private employers within that state against their federal unemployment tax. Therefore, the plaintiffs' suit to hold unconstitutional the amendments, and thereby prevent the denial of this tax credit, is in essence a suit to restrain the assessment of a tax. The fact that the claims made by the plaintiffs are of a "constitutional nature . . . is of no consequence under the Anti-Injunction Act." *Commissioner of Internal Revenue v. "American United" Inc.*, 416 U.S. 752, 759, 94 S.Ct. 2053, 2058 40 L.Ed.2d 518 (1974). Furthermore, the exceptions do not apply. First, the Court cannot conclude that under no circumstances could the Government prevail. The fact that equitable jurisdiction may exist, i.e., that the plaintiffs may suffer irreparable injury, is not enough to avoid the effect of the Act. 416 U.S. at 761-62, 94 S.Ct. 2053. Second, unlike *Investment Annuity, supra,* there could be judicial review of this legislation. As long as the state does not enact conforming legislation, the private employers, who will lose their tax credit, will be able to challenge the legislation in a suit for a refund. Moreover, if the state does not enact conforming legislation, the state is entitled to judicial review before the Secretary of Labor's refusal to certify the state is final.[1] Thus, it appers at this stage of the litigation that the plaintiffs' suit is barred by the Anti-Injunction Act and, therefore, it would be improper for this Court to issue a preliminary injunction.

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[1]It is unimportant that the plaintiffs have voluntarily chosen to enact the conforming legislation rather than obtain judicial review by refusing to do so. One cannot render an available review procedure an inadequate remedy (and thereby attempt to circumvent the Anti-Injunction Act) by voluntarily foregoing it. *See Commissioner of Internal Revenue v. "Americans United" Inc.*, 416 U.S. 752, 762 n.13, 94 S.Ct. 2053, 40 L.Ed.2d 518 (1974).

Having found that it is unlikely that the Court even has jurisdiction over this action, it is unnecessary to address the four factors the Court must consider in deciding whether to issue an injunction. However, the Court believes it is important in a case of this magnitude to discuss the four factors, assuming *arguendo* that the Anti-Injunction Act does not bar this action.

[6] In *Virginia Petroleum Jobbers Association v. FPC*, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958), the court enumerated the factors that must be considered in a suit for an injunction: has the plaintiff made a strong showing that it is likely to prevail on the merits; would the denial of the injunction cause irreparable injury to the plaintiff; would the granting of the injunction cause irreparable injury to the other parties; and where does the public interest lie. The Court in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S.App.D.C. 220, 559 F.2d 841 (1977), held that these factors are to be balanced and suggested that an injunction may be denied when, even though the irreparable injury to the plaintiff from such denial may be substantial, the likelihood of success on the merits is minimal. 182 U.S.App.D.C. at 223, 559 F.2d at 844. In light of these precedents, the Court has considered the four factors and finds that, at the present time, the plaintiffs' likelihood of succeeding on the merits is minimal, the irreparable injury to the plaintiffs from the denial of the injunction could have been avoided by the plaintiffs, and the irreparable injury to the defendants – and the public interest – clearly demands that an injunction not be issued.

**A. The Court Finds That It Is Unlikely That The Plaintiffs Will Prevail On The Merits In Light Of Steward Machine Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1936).**

The thrust of the plaintiff's attack on the 1976 amendments is that Congress has violated the tenth amendment because the amendments infringe upon the sovereignty of the state. Chief reliance is placed upon *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), in which the Supreme Court held that the federal government could not impose mandatory minimum wage or hour regulations on the states with respect to their employees. The Court found that these rules violated the tenth amendment because they interfere with "integral governmental functions" of the state and would impair the state's "ability to function effectively in a federal system." 426 U.S. at 852, 96 S.Ct. at 2470. The plaintiffs here argue that the 1976 amendments interfere in this way because they coerce the states into adopting legislation affecting thier employees and displacing personnel decisions.

[7] The Court finds that *National League of Cities* is distinguishable from the case at bar. The regulations there were mandatory on the states; here, the imposition of an unemployment compensation scheme is at the option of the state. *See State of North Carolina ex rel. Morrow v. Califano,* No. 76-0049, slip op. at 9 n.10 (E.D.N.C. Sept. 22, 1977) (3-judge court). This is crucial because the Supreme Court stressed the fact that under the regulations in *National League of Cities,* the "only" discretion' left to" the states was how to raise the additional revenue. 426 U.S. at 848, 96 S.Ct. 2465. Furthermore, the Court there stressed several times that the challenged regulations *directly* displaced the state's freedom to structure its

operations. Thus, legislation that allows the state a choice — to avoid enacting a scheme that *may* interfere with a state sovereignty and is not in violation of the tenth amendment.[2] In fact, the 1976 amendments are supportive of the tenth amendment by allowing the states a choice and, thereby, preserving the independence of the state's decision.

[8] The plaintiffs attempt to avoid this distinction between the amendments here and those involved in *National League of Cities* by arguing that the state's "choice" is an illusory one. Plaintiffs assert that the states are "coerced" into adopting an unemployment scheme covering former public employees. The Supreme Court in *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), held that the unemployment compensation scheme offered as an option to the states, which was designed to induce the states to enact conforming legislation for *private* employees, did not violate the tenth amendment because the states were *not coerced* into adopting the legislation. The scheme there was virtually identical to that now before the Court, except that Congress, in the 1976 amendments, has required as a further condition for the tax credit to the private employers, that their state bring public employees within the umbrella of coverage of unemployment compensation. However, the same issue of whether the statutory scheme *coerced* the states into enacting the legislation, as was present in *Steward,* is present in the case here. The Supreme Court's

[2]This, of course, assumes that the consequences of not enacting the legislation will not interfere with the states' sovereignty. Here, the consequences of refusing to enact the legislation are a denial of a tax credit to private employers and the loss of some federal funds. *These* consequences do not in any way impair the ability of the state to function effectively in a federal system.

discussion of "coercion"[3] is therefore relevant to the likelihood of the plaintiffs' success on the merits.

> The difficulty with the petitioner's contention [that the state is coerced in violation of the tenth amendment] is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States,* [300 U.S. 506, 57 S.Ct. 554, 81 L.Ed. 772], *supra.* In like manner every rebate from a tax when conditioned upon conduct is in some measure tempation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.

301 U.S. at 589-90, 57 S.Ct. at 892. However, the Court did place a limitation upon what Congress could use as a

[3]The plaintiffs attempt to distinguish the *Steward* case on the basis that the Supreme Court there stated that the states did not complain of coercion. 301 U.S. at 589, 57 S.Ct. 883. The fact that a state chooses to voice objection rather than remain silent while a private employer voices objection, as in *Steward*, should not be determinative of the outcome. This is especially true when the same indicia of coercion as was present in *Steward* exists here. At the time the case was decided, 35 of the 43 states that had enacted conforming legislation included "self-destruct" clauses. 301 U.S. at 369-70, 57 S.Ct. 883 (Oral Argument of Mr. Sterne). (Self-destruct clauses in state legislation state that if an injunction should issue restraining the enforcement of the federal legislation, this would automatically repeal the state legislation.) Plaintiffs have argued that the self-destruct clauses are indicative of coercion upon the states. Therefore, accepting the validity of plaintiffs' contention that self-destruct clauses indicate coercion, the Supreme Court was faced with a situation similar to the present one, where several states have also enacted the self-destruct clauses. This was not enough to prove coercion in *Steward* and it is not enough now.

condition; Congress cannot condition a tax credit upon the adoption of a statute "unrelated in subject matter to activities fairly within the scope of national policy and power." 301 U.S. at 590, 57 S.Ct. at 892. Moreover, the Court explicitly stated that inducement does not become coercion when the tax credit will be available "upon the doing of an act that will satisfy the fiscal need." 301 U.S. at 591, 57 S.Ct. at 892.

[9] Applying these principles to this case, the Court finds that plaintiffs are not likely to prevail on the merits. Congress's motive in enacting the 1976 amendments – to induce the states to pay for the unemployment compensation of their former employees – should not be confused with coercion. Congress has great latitude in fixing the terms upon which its money allotments (and tax credits) may be conditioned. *See Oklahoma v. Civil Service Commission,* 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1946). One limitation, of course, as the Court in *Stewart* noted, is that the conditions must be within the power of Congress. This Court finds that it is within the power of Congress to attempt to deal with the problems of unemployment by inducing the states to extent unemployment comepensation to public employees. Furthermore, Congress does not intrude upon fields foreign to its function by extending this credit to private employers as an incentive to the states to enact legislation that will aid the general welfare. *See Oklahoma v. Civil Service Commission, supra* at 144, 67 S.Ct. 544. Therefore, it appears at this time that plaintiffs will have a difficult struggle to prove "coercion" so as to invoke the tenth amendment violation. Accordingly, it appears unlikely that plaintiffs will prevail on the merits.

**B. The Plaintiffs Can Avoid Any Alleged Irreparable Injury By Refusing To Enact The Conforming Legislation.**

The plaintiffs allege that if an injunction is not issued, they will suffer irreparable injury in that they will have to pay funds to the federal government, and that they will have to fire employees and/or curtail services in order to raise the needed revenue.

The simple answer to this argument is that one of this alleged irreparable injury need result if the state elects not to enact the conforming legislation. It would then lose some federal grants for administration of its unemployment compensation program, the federal share of certain extended benefits, and the tax credits for its private employers — but it would not have to fire anyone or curtail any services.[4] Furthermore, if a state chose not to enact the legislation, no adverse consequences at all would result until the state received a full judicial determination of the Secretary of Labor's refusal to certify the state. Thus, any injury to the plaintiff would not now be imminent if the state had decided not to enact the conforming legislation.

Even if a state did choose to adopt the unemployment compensation scheme, the United States will reimburse a state for all liability for unemployment paid for weeks prior to July 1, 1978. Thus, the plaintiffs need not pay any money at the present time, nor will they be liable for any money, until several months hence. In fact, the plaintiffs

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[4]Plaintiffs have alleged that if they refuse to enact the legislation, they will be injured in that the denial of the tax credit will induce private employers to leave the state and other private employers not to move to the state. The Court finds this allegation far too speculative at this time at this stage of the litigation.

have not shown that, if they do pay any money to the federal government, they cannot recoup this amount later if they prevail on the merits. As the defendant point out, if plaintiffs are ultimately successful, they can obtain a tax refund and will have suffered no loss of funds. *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction, at 35 (Dec. 14, 1977).

Accordingly, the Court finds that any irreparable injury that the plaintiffs may suffer as a result of the denial of an injunction could be avoided by refusing to enact or by repealing the conforming legislation. Furthermore, the amount of money that the states will have to place into the trust will be vastly diminished by the fact that the United States will reimburse much of it for the first year. Moreover, the Court will attempt to resolve this entire issue as soon as practicable so as not to cause any undue injury to the states should they enact the conforming legislation.

### C. The Issuance Of An Injunction Will Deny Unemployment Compensation Benefits To Public Employees And Will Thereby Cause A Substantial Irreparable Injury To The Defendants' Interest And The Public Interest.

If an injunction is issued, public employees will not be covered under any unemployment compensation plan (unless the state has voluntarily enacted legislation to cover them). The reason for this is that until the present time, these employees have been covered by the Special Unemployment Assistance program, funded by the federal government. However, this program, created as a temporary one, will expire on December 31, 1977. Therefore, unless states enact legislation to cover these employees, they will not receive unemployment compensation.

The Court finds that there is a strong public interest in preventing some 2 million state employees and some hundreds of thousands of local government employees from becoming unemployed without economic resources. Lack of such coverage could result in the inability to meet the rising costs of food, clothing, shelter, etc. This would certainly be irreparable injury – to these individuals and to society in general. Thus, the injunction will not be issued at this time.[5]

## III. CONCLUSION

The Court will therefore deny the plaintiffs' and the intervenor-plaintiffs' motion for a preliminary injunction. At this stage of the litigation, it does not appear to the Court that the plaintiffs will be able to maintain this suit because of the Anti-Injunction Act. Furthermore, even if the Act does not bar this suit, it appears unlikely at this stage that the plaintiffs will be able to prevail on the merits. The irreparable injury to the public should an injunction be issued clearly outweighs the avoidable injury which the plaintiffs may suffer if the injunction is granted.

An Order in accordance with the foregoing will be issue of even date herewith.

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[5]The suggestion has been made, in some of the papers and at oral argument, that the failure to issue the injunction here will result in virtual bankruptcy of some cities and states throughout the country if such entities must pay unemployment benefits to some 2 million state and some hundreds of thousands of local employees who may become eligible. The Court notes these allegations with sadness; this Court has merely done its duty to apply the law in a case of first impression under the tenth amendment to the Constitution. The court is confident that a concerted effort by federal executive, legislative, and state and local branches of government can and must find a solution to the social and economic problems involving the people and governmental entities which are affected directly and indirectly by the issues raised herein.

**4. Opinions of the United States Court of Appeals for the First Circuit in *New Hampshire Department of Employment Security v. Marshall*, 616 F.2d 240 (1st Cir. 1980), Affirming the Decision of the Secretary of Labor that the Unemployment Compensation Law of New Hampshire was not in Conformity with the FUTA.**

**STATE of NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY, et al.,**
**Petitioners,**

**v.**

**The Honorable F. Ray MARSHALL, Secretary of Labor of the United States, and the United States Department of Labor, Respondents.**

**No. 78-1564.**
United States Court of Appeals,
First Circuit.

Argued May 11, 1978.
Decided Feb. 20, 1980.

Charles S. Rhyne, Washington, D.C., and James E. Morris, Concord, N.H., with whom Edward F. Smith, Gen. Counsel, Concord, N.H., Paul V. Kenneally, William S. Rhyne, Martin W. Matzen, Stephen P. Elmendorf and Rhyne & Rhyne, Washington, D.C. were on brief, for petitioners.

Robert T. Duffy, Atty., Tax Div., Dept. of Justice, Washington, D.C., with whom M. Carr Ferguson, Asst. Atty. Gen., Gilbert E. Andrews and Leonard J. Henzke, Jr., Attys., Tax Div., Dept. of Justice, Washington, D.C., were on brief, for respondents.

George Kaufmann, Washington, D.C., with whom Zwerdling & Maurer, A.L. Zwerdling, Janet Kohn,

Leonard Lesser, J. Albert Woll, Gen. Counsel, AFL-CIO, Laurence Gold, Sp. Counsel, AFL-CIO, and Edward J. Hickey, Jr., Gen. Counsel, Washington, D.C., Public Employee Dept., AFL-CIO, were on brief, for American Federation of Labor, et al., amicus curiae.

Before CAMPBELL and BOWNES, Circuit Judges, DEVINE, District Judge.*

BOWNES, Circuit Judge.

This is an appeal pursuant to 26 U.S.C. § 3310[1] of the decision of the Secretary of Labor that the New Hampshire Unemployment Compensation law fails to conform in six separate respects with the requirements of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311.

In order to understand the issues involved, some explanation of the unemployment compensation law is necessary. The law has its roots in the Great Depression when unemployment was so widespread that the separate states were unable to meet the basic needs of their citizens. Several states, of which Wisconsin was the leader and New Hampshire an early follower, enacted their own unemployment insurance programs. The financing for these programs was obtained mainly by a tax on private

*Of the District of New Hampshire, sitting by designation.

[1]We understand that this is the first appeal under 26 U.S.C. § 3310, which provides in pertinent part:

> (a) *In general.* — Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

employers. Many states, however, refused to enact such programs fearing that the tax on local employers would cause them to flee to other states which did not have such a law. The federal unemployment insurance law was thus devised to meet a national problem. The constraints of federalism and the dictates of practical politics resulted in legislation designed to equalize the burden on the states with full participation by all. This was accomplished by the inducement of tax credits to private employers and outright grants made available to the states to help defray the administrative costs of the program. The tax on the private employer was levied and collected by the state. The moneys collected had to be promptly remitted by the states to the Secretary of the Treasury. A credit of up to 90% of the tax due was given the employer if he had made contributions to his state's unemployment insurance fund. The tax credit and the grants were contingent on certification by the Secretary of Labor that the state had enacted an unemployment compensation program that conformed to federal statutory requirements.

There was no direct statutory command to the states requiring them to conform to federal law. The federal government made an offer to the states which they could accept or refuse. Up until now, all the states found the combination of tax credits to its private employers and outright grants in return for conforming legislation an offer that could not be refused.[2]

Although the Act has been extensively amended since its inception in 1935, the basic design and statutory

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[2]For a full discussion of the genesis of the unemployment insurance program and its statutory mechanism, see *Carmichael v. Southern Coal Co.*, 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937), and *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937).

machinery have remained constant. The present statutory machinery works as follows. Under 26 U.S.C. §§ 3301 and 3306(b)(1), private employers are taxed an amount equal to 3.4 percent of the first $6,000 in wages paid each employee. 26 U.S.C. § 3302(a)(1) allows a credit of up to 2.7 percent of such wages against the tax for the employer's contribution to an unemployment fund maintained under state law. But the employer can obtain this credit only if the state's unemployment law is certified by the Secretary of Labor as provided in 26 U.S.C. § 3304.

26 U.S.C. § 3304(a) requires that the Secretary of Labor approve any state unemployment compensation law that conforms to the federal requirements. Section 3304(b) requires the Secretary to notify the governor of the state of such approval, and section 3304(c) requires the Secretary to certify such approval to the Secretary of the Treasury. Failure to obtain certification means not only the loss of FUTA tax credits for private employers, but also the loss to noncertified states of two kinds of federal grants. One grant goes towards the cost of administering the state's unemployment compensation program. 42 U.S.C. §§ 501-503. The other goes towards the administration of public employment offices which provide for job-finding, employment recruiting and other services. 29 U.S.C. §§ 49-49K.

Coverage under the unemployment compensation law was modified, restricted and expanded in 1976 by amendments to FUTA. The changes that concern us are as follows.

1. Employees of a state and its political subdivisions were required to be covered. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(B), and 26 U.S.C. § 3306(c)(7).

2. Coverage was extended to the employees of non-profit schools which are not institutions of higher learning. 26 U.S.C. § 3304(a)(6)(A), 26 U.S.C. § 3309(a)(1)(A), and 26 U.S.C. § 3306(c)(8).

3. Political subdivisions of a state were given the option of reimbursing the state for unemployment benefits paid to former employees in lieu of making payments in the same manner as private sector employees. 26 U.S.C. § 3304(a)(6)(B) and 26 U.S.C. § 3309(a)(2).

4. 26 U.S.C. § 3304(a)(14)(A), (B) and (C) restricted the coverage of aliens, required uniform reporting of alien status data and imposed the preponderance of the evidence test for denying compensation based on alien status. Under 26 U.S.C. § 3304(a)(9)(A), denial of compensation to an alien from a country contiguous to the state of employment solely on the basis that he filed another claim in that country was forbidden.

5. Coverage afforded to professional athletes was restricted by prohibiting the payments of benefits between athletic seasons. 26 U.S.C. § 3304(a)(13).

6. The coverage of employees of educational institutions was modified in regard to the coverage of professional and non-professional employees between academic terms or years, and during vacation periods and vacation recesses. 26 U.S.C. § 3304(a)(6)(A).

This case was precipitated by the veto on June 23, 1978, by the then governor of New Hampshire, of a bill that was intended to bring the New Hampshire Unemployment Compensation Law into conformity with the provisions of 26 U.S.C. § 3304. The state had amended its unemployment compensation law, effective January 1, 1978, in an effort to conform with the 1976 amendments. It was

notified by the Secretary of Labor in February of 1978 that he had serious questions as to whether this law conformed with federal requirements. This led to the June, 1978, legislation, the veto of which was accepted by the legislature.

After the veto of the conformity legislation, a hearing pursuant to 26 U.S.C. § 3304(c), was scheduled by the Department of Labor on whether New Hampshire was in conformity in regard to the five categories of coverage and the optional payment provision for political subdivisions of the state. The hearing was held on September 14 and 15, 1978. In addition to the six conformity issues, New Hampshire challenged the constitutionality of the 1976 amendments as they related to coverage of the employees of a state and its political subdivision. Indeed, almost all of the evidence introduced by New Hampshire focused on the constitutional issue. the administrative law judge (ALJ) found that New Hampshire's unemployment law failed to conform with federal law in all six respects claimed by the Secretary. He made findings of fact as to the constitutional issue, but made no ruling thereon. In reviewing the opinion of the ALJ, the Secretary made additional findings, modified a conclusion of law, corrected some errors and then adopted the findings of facts and conclusions of law of the ALJ as his own.**

**On June 23, 1979, New Hampshire enacted House Bill 808 in an attempt to conform with the 1976 FUTA amendments. We asked for briefs on the question of whether this legislation rendered the case moot. The State of New Hampshire, in a brief by its Attorney General, urged that the case was moot. The other parties, the Department of Labor, the State of New Hampshire Department of Employment Security, and the Amicus took the position that the case was not moot.

Our examination of the bill and subsequent events convince us that the case is not moot. House Bill 808 did provide a framework for bringing New Hampshire into conformity with FUTA. The legislation

The parties differ on the scope of our review. Petitioners focus on the constitutionality of the 1976 amendments while respondents assert that, if we uphold the findings of statutory violations, we need not and should not reach the constitutional issue. While the course suggested by respondents is tempting, we feel that we must decide both the conformity and constitutional issues.

The state did not meet the conformity requirements of 26 U.S.C. § 3304, nor does it so claim. As already noted, it introduced practically no evidence at the hearing on conformity and did not urge that it had complied with the law. New Hamsphire's brief is devoted almost exclusively to the constitutional question. In fact, it admits nonconformity by stating, "New Hampshire has failed to satisfy the Secretary as to the requirements of the 1976 amendments, solely because of its refusal to amend its law to accom-

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alone, however, could not bring New Hampshire into full compliance. Conforming rules and regulations had to be promulgated by the New Hampshire Department of Employment Security to flesh out the bare bones lesiglation. These required the approval of the Secretary of Labor. In addition, administrative action by New Hampshire was necessary to give such rules and regulations retroactive effect. The parties attempted for months to agree on the rules and regulations and administrative action for implementing House Bill 808 and bringing New Hampshire into conformity with the FUTA amendments. The State of New Hampshire and the Department of Labor did agree on conforming rules and regulations and a judgement was prepared embodying them. The New Hampshire Department of Employment Security, however, refused to approve the judgment agreed upon the the Department of Labor and the State. Since the judgment had to be implemented by the New Hampshire Department of Employment Security and since this department is completely autonomous, there can be no settlement without its approval.

It must also be noted that the House Bill 808's statement of purpose expresses clearly and forcibly the opinion of the New Hampshire Legislature that it had no other alternative but to accede to this "federal intrusion of its sovereignty" and that the legislation was enacted "under duress and for no other reason."

modate the unconstitutional public sector program financing requirements." Brief at 66. This admission is repeated in its supplemental brief at 11.

This is clearly not the type of case where statutory interpretation makes it unnecessary to meet the constitutional issues. New Hampshire made it clear before the ALJ at the hearing, and before us, that it was refusing to conform because it felt that the statute itself was unconstitutional. New Hampshire's decision to put all its eggs in the constitutional basket, however, does not mean that we can avoid our statutory duty of review of the Secretary's order. *See New York City Transit Authority v. Beazer,* 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). We must determine whether there is substantial evidence on the record to support the Secretary's findings.[3]

The evidence presented at the hearing can be summarized as follows. New Hampshire was advised during the period October 21, 1976, through June 24, 1978, by the Department of Labor what amendments would be necessary to bring its unemployment compensation law into conformity with 26 U.S.C. § 3304. The Department of Labor specifically informed the state that its law was deficient in the six categories already outlined.

The evidence was uncontradicted that, although New Hampshire has provided full unemployment insurance coverage for its permanent and classified civil service employees, temporary and seasonal workers and those not

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[3] 26 U.S.C. § 3310(b) provides in pertinent part:

> (b) *Findings of fact.* — The findings of fact by the Secretary of Labor, if supported by substantial evidence, shall be conclusive[.]

classified are not covered. H.H.Rev.Stat.Ann. § 282:
1H(4)(g) and (q) specifically exclude from coverage employees of political subdivisions and nonclassified state workers. The finding of the Secretary that New Hampshire did not meet the requirements of federal law as to coverage of employees of the state and its political subdivisions was clearly correct. This finding is also the basis for the Secretary's determination that the option provisions of the federal statute were not met because, under New Hampshire law, N.H.Rev.Stat.Ann. § 282:6A-2, payments into the unemployment compensation fund by political subdivisions of the state were limited to those who had elected coverage.

N.H.Rev.Stat.Ann. § 282:1H(4)(s)(3) specifically excludes from coverage those "in the employ of a school which is not an institution of higher education." This is directly contrary to the 1976 FUTA amendment which requires the states to cover employees of nonprofit schools below the level of institutions of higher education.

Under subsections (B) and (C) of 26 U.S.C. § 3304(a)(14), information as to alien status must be uniformly required from all compensation applicants, and a state agency can only deny compensation because of alien status on a preponderance of the evidence. New Hampshire law does not have any alien status conforming provisions. Under N.H.Rev.Stat.Ann. § 282:10(1)(a), it is specified that wages shall not include the amount of any payment to an alien unless he was in the United States under color of law. The Secretary found this provision was ambiguous and might conflict with federal law relative to aliens from a country contiguous to that of the state in which he is employed. We agree.

The Secretary properly found that under New Hampshire law, N.H.Rev.Stat.Ann. § 280:10, payments to athletes between seasons were not prohibited as required by federal law, but only reduced by eliminating the sports income from the athlete's base period earnings.

The Secretary's findings as to employees of educational institutions are based on a restricted and technical reading of the federal statutory provisions. If this were the only issue, we might be persuaded to find that New Hampshire was in substantial compliance, but the broad provisions of the New Hamsphire statute, N.H.Rev.Stat.Ann. § 280:3F, leave too much to interpretation and construction to satisfy the tight federal requirements.

[1] We uphold the decision of the administrative law judge, as modified and adopted by the Secretary, that New Hampshire's Unemployment Compensation law was in the six respects specified not in conformity with the requirements of the implicated 1976 amendments to FUTA.

[2] The constitutional issue can be stated thusly: do the 1976 amendments to FUTA violate the sovereign integrity of the states and impair their ability to function effectively under the federal system as guaranteed by the tenth amendment.

The basic question is whether this case falls within the new furrow ploughed by *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), or follows in the wake of *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). In *Usery*, the Supreme Court, in a five to four decision, overruled *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017,

20 L.Ed.2d 1020 (1968),[4] and held that the 1974 amendments of the Fair Labor Standards Act (FLSA) extending its provisions to employees of the states and their political subdivisions were unconstitutional and prohibited by the tenth amendment. Petitioners urge that its holding and rationale also doom the 1976 FUTA amendments which apply to the same employee groups.

We note first that only two of the six nonconformity findings implicate the tenth amendment, the one pertaining to coverage of employees of the state and its political subdivisions[5] and the option given these entities relative to the method of payment.[6]

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[4]"While there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens. We are, therefore, persuaded that *Wirtz* must be overruled." *National League of Cities v. Usery*, 426 U.S. 833, 855, 96 S.Ct. 2465, 2476, 49 L.Ed.2d 245 (1976).

[5]The other four nonconformity findings are limited to the private sector. New Hampshire, in its latest brief, acknowledges its duty to conform to the 1976 amendments as they apply to the private sector, but argues that respondent Secretary waived these requirements pending resolution of the constitutional issue. The Secretary denied any waiver and argues that New Hampshire is precluded from asserting a waiver since it was not raised below. We find no evidence of a waiver by the Secretary.

[6]For purposes of this discussion, we include public school employees as employees of political subdivisions of the state. We are aware, of course, that in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the Supreme Court held that a local school board was not an arm of the state and, therefore, not entitled to invoke the bar of the eleventh amendment. *Id.* at 280-81, 97 S.Ct. at 572-73. We do not think, however, that this limitation applies to the tenth amendment.

Our analysis begins with the obvious; that we are dealing with a different federal statute and, more importantly, a different regulatory method than was at issue in *Usery*. The minimum wage and maximum hour provisions of the Fair Labor Standards Act (FLSA) invalidated in *Usery* were imposed on the states by command. The authority for such command rested on the commerce clause. On the other hand, the 1976 FUTA amendments, following the design of the original Act, were not based on the commerce clause and were not directly imposed on the states which had the option of conforming or not.

There is no doubt that *Usery* focused on the command of the FLSA amendments that the states must adopt the maximum hours and minimum wage provisions for its own employees.

> The Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress.

*National League of Cities v. Usery, supra,* 426 U.S. at 847-48, 96 S.Ct. at 2472.

> But, like the minimum wage provisions, the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire governmental employees on terms different from those which Congress has sought to impose.

*Id.* at 849, 96 S.Ct. at 2473.

This command to the state is given bite by 29 U.S.C. § 216, which provides for both civil and criminal penalties in the event of a violation.

In contrast, the basic premise and statutory scheme of the federal-state unemployment compensation program,

which have remained unchanged since 1935, are based on the concept that a state is free to accept federal conditions by conforming to federal statutory requirements or can refuse to participate entirely. Unlike the legislation at issue in *Usery* and *Maryland v. Wirtz, supra,* the commerce clause is not implicated. Congress chose to advance this legislation through its spending power. In *Steward Machine Co. v. Davis, supra,* 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), validity of the tax on employers was upheld against constitutional attack. Mr. Justice Cardozo, writing for the majority, outlined the history and purpose of this historic legislation and held that "[t]he excise is not void as involving the coercion of the states in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585, 57 S.Ct. at 890. An attack on a state's (Alabama) conforming legislation on the ground that its enactment was coerced by the federal government was rebuffed in *Camichael v. Southern Coal Co.,* 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937).

Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. Petitioners assert that, while the 1976 federal statutory requirements are not imposed by fiat, as with the 1974 amendments to the FLSA, the coercive effect is the same. This is particularly so, they contend, because most of the financial burden for a state's decision not to conform falls on its private employers through loss of federal tax credits. All parties agree that the cost to the private employers in New Hampshire will be about forty million dollars in 1978 tax credits. It is argued that by holding the private employers "ransom," Congress coerces compliance.

We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.[7] The basic design and mechanism of the Act have not changed since 1935. Its coverage has been extended,[8] but the percentage of tax credits remains essentially the same.[9] The primary reason, of course, for the increase in the dollar amount of tax credits has been the expansion of our economy since 1935. The increase in the number of employers and employees and the amount paid in wages has meant a corresponding increase in the dollar amount of tax credits.

We must also recognize that, since 1935, the philosophy and objective of the unemployment compensation program, viz., that unemployment is a national problem that

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New Hampshire is the only state that has opted not to conform. It repeatedly stresses in its brief the burden on the states' employers if the Act is held constitutional. We observe that it is easy to gamble for high stakes when the money on the table comes from someone else's pocket.

[8]The categories of employees have expanded. Single employees are now covered. Federal civilian employees were included in 1954 with provisions to reimburse the states for the benefits paid and the administrative costs. In 1966, federal military personnel were covered. In 1970, conformity requirements were passed to extend coverage to employees of state hospitals and state institutions of higher learning. The 1976 amendments extended the tax to farms which employ ten or more workers for certain time periods or pay at least $20,000 in wages in any calendar quarter. 26 U.S.C. § 3306(a)(2). Under 26 U.S.C. § 3306(a)(3), employers of domestic workers were included.

[9]Originally, FUTA was based on the total wages of each employee. In 1940, the tax was limited to the first $3,000 of each employee's wages. At present, the tax base is the first $6,000 of wages. Unemployment Compensation Amendments of 1976. The tax rate has gone from 3.0 percent to its present rate of 3.4 percent; the tax credit has remained constant at 2.7 percent.

must be dealt with on a national basis, have been woven into the fabric of our society.[10]

In *Usery*, the Court specifically refrained from deciding whether the spending power could be unconstitutionally used to impair state sovereignty:

> We express no view as to whether different results might obtain if Congress seek to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

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[10]In the Emergency Unemployment Compensation Act of 1974, Congress extended emergency benefits for individuals who had exhausted their regular benefits during a period of high unemployment. Although emergency benefits were funded entirely by the federal government, only certified states could participate in the program. The Emergency Jobs and Unemployment Assistance Act of 1974 provided unemployment benefits for individuals generally not covered under the regular program, *i.e.*, agricultural and domestic workers and employees of state and local governments. This program was fully funded by the federal government, but was payable only in areas designated by the Secretary of Labor during periods of high unemployment. During fiscal 1976, the federal government paid about 3.4 billion dollars in emergency benefits. U.S. Dept. of Labor, Sixty-Fourth Annual Report 12-13 (1976.) Federal grants to the states for the administration of their unemployment compensation program amounted to over $900,000,000 for fiscal 1977. 1 House Hearings before SubComm. of Comm. on Appropriations, 95th Cong. 2d Sess. 191 (1978). When state reserves are insufficient to meet the need for benefit payments, the federal government through the unemployment trust fund lends the needed funds to the state. Such loans are interest free. As of February 1, 1978, there were outstanding loans to twenty-one states in the aggregate amount of $4.9 billion. 1 House Hearings, *supra*, at 168-69. Federal appropriations of FUTA tax receipts to the unemployment trust fund amounted to over $1.5 billion in fiscal 1976, and almost $2 billion in fiscal 1977. The Budget of the U.S., Fiscal year 1978, App. 508; The Budget of the U.S., Fiscal year 1979, App. 621.

*National League of Cities v. Usery,* 426 U.S. at 852 n.17, 96 S.Ct. at 2474 n.17.

We construe *Usery* to hold that congressional legislation based upon the commerce clause which impairs the sovereign functions of the states is unconstitutional. Two other circuits have refused to extend the *Usery* doctrine to legislation not squarely bottomed on the commerce clause. In *Usery v. Charlestown City School District,* 558 F.2d 1169 (4th Cir. 1977), and in *Usery v. Allegheny County Institution District,* 544 F.2d 148 (3d Cir. 1976), *cert. denied,* 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793 (1977), the courts rejected arguments that, in light of *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Equal Pay Act was an unconstitutional exercise of congressional authority under the commerce clause. Both courts viewed the application of the Equal Pay Act to the states as a legitimate exercise of congressional authority to adopt legislation enforcing the fourteenth amendment's guaranty of equal protection of the law. Similarly, in *Arritt v.Grisell,* 567 F.2d 1267 (4th Cir. 1977), the court held that Congress enacted the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, under section 5 of the fourteenth amendment,[11] rejecting the contention that the ADEA was impermissibly grounded on the commerce clause.

The tax at issue here, FUTA, is not based on the power of Congress under the commerce clause. Congress has relied on the attraction of the federal purse to persuade the states that it is in their best interests to conform to a national unemployment insurance program. Inducing state participation in national programs by the offer of federal

[11] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

funds is not limited to the unemployment compensation program. In *North Carolina ex rel. Morrow v. Califano,* 445 F.Supp. 532 (E.D.N.C.1977), *aff'd,* 435 U.S. 962, 98 S.Ct. 1597, 55 L.Ed.2d 54 (1978), the issue of the constitutionality of a conformity addition to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300K *et seq.* was raised. In upholding the constitutionality of the Act, the court specifically stated:

> It must be remembered that this Act is not compulsory on the State. Unlike the legislation faulted in *State of Maryland v. Environmental Protection Ag., supra,* 530 F.2d 215 [4th Cir.], it does not impose a mandatory requirement to enact legislation on the State; it give to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not "coercive" in the constitutional sense (emphasis in original).

*Id.* at 535-36.

Under the Medicaid Act, Title XIX of the Social Security Act of 1965, participating states are enabled by the use of federal funds to provide medical services for welfare recipients. A state's participation in Medicaid is voluntary but, if it chooses to participate, its plan must conform to the requirements imposed by the Medicaid Act. *Preterm, Inc. v. Dukakis,* 591 F.2d 121, 124 (1st Cir.), *cert. denied,* 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1057 (1979).

Since it can be argued that *Usery* was based on two separate and distinct concepts, the tenth amendment supremacy over the commerce clause *and/or* the impairment of state sovereignty, we next consider the evidence presented at the Labor Department hearing on impairment

of New Hampshire's sovereignty due to the cost of extending unemployment benefits to uncovered state employees and employees of its political subdivisions. The finance officer of the City of Manchester (New Hampshire's largest city) testified that over the past nine years no permanent employees had been laid off, but the cost of covering the City's temporary seasonal employees would require costly new staffing and record-keeping practices which would affect the ability of the City to maintain existing programs. The testimony of Elizabeth Puddington, a consultant to the New Hampshire School Boards Association, was that, because of New Hampshire's dependence on the property tax and the difficulties inherent in increasing revenues therefrom, the cost of extending unemployment benefits to public schools would probably result in a curtailment of educational programs.

The sale of liquor through state licensed stores is one of the main sources of state revenue. The Director of Merchandising and Accounts of the New Hampshire State Liquor Commission estimated that the cost of extending unemployment benefits to Commission employees would be $75,000 – $80,000 annually with a potential cost of $120,000 annually. The Comptroller of the State testified that the annual cost under the reimbursement method of financing unemployment benefits could amount to as much as $4.3 million and that, under the alternate contributing tax method, the cost would be about $300,000.

The cost to the New Hampshire Department of Employment Security for administering the additional coverage would be between $75,000 and $150,000 annually, according to the affidavit of its deputy commissioner. There was also affidavit testimony as to the additional cost to the Department of Health and Welfare – $30,528 and $4,830 for the Fish and Game Department.

The overall cost to New Hampshire and its political subdivisions for unemployment coverage was the subject of expert testimony at the hearing. Lennox L. Moak was the expert for the state. He testified that the additional cost to the state would be $200,000 and $900,000 for its political subdivisions, for a total of $1,100,000. Dr. James D. Van Erden testified as an expert for the Labor Department. He estimated that the total cost to New Hampshire and its political subdivisions for fiscal 1978 would amount to $227,585, for fiscal 1979, $288,935, and for fiscal 1980, $330,787.[12]

Unlike the effect of the wage and hour standards in *Usery*, we do not think that this evidence establishes that extending coverage to the employees of New Hampshire and its political subdivisions will "significantly alter or displace" the ability of New Hampshire "to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health and parks and recreation." *National League of Cities v. Usery*, 426 U.S. at 851, 96 S.Ct. at 2474. FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees. Its administration is entirely within the control of the state. *See Perace v. Wichita County*, 590 F.2d 128 (5th Cir. 1979), and *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978), in which the Equal Pay Act was upheld as constitutional under the commerce clause on the grounds that, unlike the minimum wage provisions condemned in *Usery*,

[12]In reviewing the findings of the ALJ, the Secretary made the following conclusion of law, which we find to be correct. "Due to New Hampshire's base period and benefit year, all of the cost for FY 1978 and approximately one-half the cost for FY 1979 of extending coverage to state and local government employees could have been, at New Hampshire's Option, covered by the Federal Government under the transition provision (Section 121) of the 1976 Amendments."

the provisions of the Equal Pay Act did not impermissibly interfere with the states' employment scheme.

We hold that the 1976 amendments to FUTA relative to employees of a state or its political subdivisions do not impair the sovereignty of New Hampshire and have not been rendered unconstitutional by *Usery*.

There is one more matter that requires our attention, the request of Amicus Los Angeles County to reconsider our order dismissing it as a named petitioner in the case. Our order is reaffirmed for lack of jurisdiction under 26 U.S.C. § 3310(a).[13] We must also note that Amicus is represented by the same attorney representing the State of New Hampshire Department of Employment Security. By use of the Amicus format, the petitioner has had an opportunity to present its constitutional arguments exhaustively from every conceivable angle.

LEVIN H. CAMPBELL, Circuit Judge (concurring).

Like my colleagues, I find substantial evidence to support the decision of the Secretary of Labor that New Hampshire's unemployment compensation law failed in six specific respects to conform to the 1976 federal amendments. *See* 26 U.S.C. § 3310(b). This being so, even if New Hampshire's constitutional challenge to the statutory provision requiring it to provide unemployment coverage

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[13] 26 U.S.C. § 3310(a) provides in pertinent part:

> Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action.

to state and local employees were correct, the Secretary was nonetheless entitled to withhold funding. Given an adequate statutory ground upon which to uphold the Secretary's decision, I therefore believe it to be unnecessary and inappropriate to decide New Hampshire's constitutional challenge.

Under 26 U.S.C. § 3304(c), the Secretary is commanded by Congress to withhold certification from any state which the Secretary "finds has failed to amend its law so that it contains *each* of the provisions requid by reason of the enactment of the Unemployment Compensation Amendments of 1976 to be included therein." (Emphasis added.) As I read this law, if the state's enactment fails to conform to the federal requirements in even one material respect, the Secretary is required to withhold certification. New Hampshire concedes that its law has not been amended to conform to the federal requirements, and that the law is deficient in six different areas. The state's constitutional challenge, however, relates to only two of these areas, those involving coverage for public employees. Even were we to find this part of the federal act unconstitutional, as New Hampshire urges, we would neverthelless be constrained to affirm the decision of the Secretary insofar as it rests on the four provisions of the 1976 amendments that are undoubtedly constitutional.[1]

As the Supreme Court has recently observed:

> " 'If there is one doctrine more deeply rooted than any other in the process of constitutional

[1] I think it is plain that *Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937), would foreclose any attempt by the state to argue that the federal act is unconstitutional in its application to private employers. Four of the requirements to which New Hampshire's statute was found not to conform concerned private employers. See discussion in majority opinion at p. 244.

> adjudication, it is that we ought not to pass on questions of constitutionality. . . unless such adjudication is unavoidable.' *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 [, 65 S.Ct. 152, 154, 89 L.Ed. 101]. Before deciding [a] constitutional question, it [is] incumbent on . . . courts to consider whether . . . statutory grounds might be dispositive."

*New York Transit Authority v. Beazer*, 440 U.S. 568, 582, 99 S.Ct. 1355, 1364, 59 L.Ed.2d 587 (1979); *see also Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69, 67 S.Ct. 1409, 1419, 91 L.Ed. 1666 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346-47, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Since the statutory ground in this case is entirely dispositive, I see no reason to follow the parties into collateral issues. If New Hampshire wished a ruling on its point of constitutional law, it should first have conformed its laws in all respects not implicating the constitutional issue.

I would add that apart from the reasons given above for avoiding constitutional adjudication, I take no particular exception to the court's decision.

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*Fed.R.App.P. 34(a); 5th Cir. R.18.

## APPENDIX D

**Judgment of the United States Court of Appeals for the Ninth Circuit in *City of Burbank v. United States* Affirming the Judgment of the District Court.**

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF BURBANK, etc.,

Plaintiff-Appellant,

vs.

No. 80-5548
DC CV
80-205 MML

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 6, 1982

# APPENDIX E

## Constitutional and Statutory Provisions

### 1. Constitutional Provisions

#### ARTICLE I, SECTION 8, CLAUSE 1

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

#### ARTICLE I, SECTION 9, CLAUSE 7

No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

#### ARTICLE IV, SECTION 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**2. Selected provisions of the FUTA and Related Federal Statutes.**

**Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (1976 & Supp. IV 1980), 26 U.S.C.A. §§ 3301-3311 (West.Supp. 1982), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 193,271-273, 276-277, 96 Stat. 324, 408-09, 554-57, 558-59.**

**§ 3301. Rate of tax**

There is hereby imposed on every employer (as defined in section 3306(a) for each calendar year an excise tax, with respect to having individuals in his employ, equal to –

(1) 3.4 percent, in the case of a calendar year beginning before the first calendar year after 1976, as of January 1 of which there is not a balance of repayable advances made to the extended unemployed compensation account (established by section 905(a) of the Social Security Act); or

(2) 3.2 percent, in the case of such first calendar year and each calendar year thereafter;

of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

**§ 3302. Credits against tax**

(a) Contributions to state unemployment funds.–

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 3301 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified as provided in

section 3304 for the 12-month period ending on October 31 of such year.

(2) The credit shall be permitted against the tax for the taxable year only for the amount of contributions paid with respect to such taxable year.

. . . .

**(c) Limit on total credits.–**

(1) The total credits allowed to a taxpayer under this section shall not exceed 90 percent of the tax against which such credits are allowable.

. . . .

**(d) Definitions and special rules relating to subsection (c).–**

(1) Rate of tax deemed to be 3 percent. – In applying subsection (c), the tax imposed by section 3301 shall be computed at the rate of 3 percent in lieu of the rate provided by such section.

. . . .

**§ 3304. Approval of State Laws**

(a) Requirements. – The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that–

(1) all compensation is to be paid through public employment offices or such other agencies as the Secretary of Labor may approve;

(2) no compensation shall be payable with respect to any day of unemployment occurring within 2 years after the first day of the first period with respect to which contributions are required;

(3) all money received in the unemployment fund shall (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section

3305(b)) immediately upon such receipt be paid over to the Secretary of the Treasury to the credit of the Unemployment Trust Fund established by section 904 of the Social Security Act (42 U.S.C 1104);

(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that—

(A) an amount equal to the amount of employee payments into the unemployment fund of a state may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration; and

(B) the amounts specified by section 903(c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment offices. . . .

(6)(A) compensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law . . . and

(B) payments (in lieu of contributions) with respect to service to which section 3309(a)(1) applies may be made into the State unemployment fund on the basis set forth in section 3309(a)(2) . . .

(11) extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970 . . . .

. . . .

**§ 3306. Definitions**

(a) Employer.— For purposes of this chapter—

(1) In general.—The term "employer" means, with respect to any calendar year, any person who—

(A) during any calendar quarter in the calendar year or the preceding calendar year paid wages of $1,500 or more, or

(B) on each of some 20 days during the calendar year or during the preceding calendar year, each day being in a different calendar week, employed at least one individual in employment for some portion of the day.

For purposes of this paragraph, there shall not be taken into account any wages paid to, or employment of, an employee performing domestic services referred to in paragraph (3).

. . . .

(b) Wages.— For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash except that such term shall not include—

(1) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeding paragraphs of this subsection) equal to $6,000 with respect to employment has been paid to an individual by an employer during

any calendar year, is paid to such individual by such employer during such calendar year. . . .

(c) Employment.— For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and (A) any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, and (B) any service, of whatever nature, performed after 1971 outside the United States (except in a contiguous country with which the United States has an agreement relating to unemployment compensation) by a citizen of the United States as an employee of an American employer (as defined in subsection (j)(3), except— . . .

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United States, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

(7) service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of any instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301 . . . .

. . . .

**§ 3309. State law coverage of services performed for nonprofit organizations or governmental entities**

(a) State law requirements.— For purposes of section 3304(a) (6)—

(1) except as otherwise provided in subsections (b) and (c), the services to which this paragraph applies are . . .

(B) service excluded from the term "employment" solely by reason of paragraph (7) of section 3306(c); and

(2) the State law shall provide that a governmental entity or any other organization (or group of governmental entities or other organizations) which, but for the requirements of this paragraph, would be liable for contributions with respect to service to which paragraph (1) applies may elect, for such minimum period and at such time as may be provided by State law, to pay (in lieu of such contributions) into the State unemployment fund amounts equal to the amounts of compensation attributable under the State law to such service. The State law may provide safeguards to ensure that governmental entities or other organizstions so electing will make the payments required under such elections.

**Selected Amendments to the FUTA in the Tax Equity and Fiscal Responsibility Act of 1982.**

**SEC. 271. INCREASE IN FEDERAL UNEMPLOYMENT TAX WAGE BASE AND RATE.**

(a) INCREASE IN WAGE BASE. – Paragraph (1) of section 3306(b)(defining wages) is amended by striking out "$6,000" each place it appears and inserting in lieu thereof "$7,000".

(b) INCREASE IN RATE. –

(1) In General. – Paragraph (1) of section 3301 (relating to rate of unemployment tax) is amended by striking out "3.4 percent" and inserting in lieu thereof "3.5 percent."

. . . .

(c) INCREASE IN RATE FOR 1985 AND THEREAFTER. –

(1) IN GENERAL. – Section 3301 (as amended by subsection (b)) is amended –

(A) by striking out "3.5 percent" and inserting in lieu thereof "6.2 percent", and

(B) by striking out "3.2 percent" and inserting in lieu thereof "6.0 percent".

(2) INCREASE IN AMOUNT OF STATE CREDIT. –

. . . .

(B) Paragraph (1) of section 3302(d) (relating to rate of tax deemed to be 3 percent) is amended by striking out "3 percent" each place it appears and inserting in lieu thereof "6 percent".

(b) [d] EFFECTIVE DATES.–

(1) SUBSECTIONS (a) and (b).– The amendments made by subsections (a) and (b) shall apply to remuneration paid after December 31, 1982.

(2) SUBSECTION (c).– The amendments made by subsection (c) shall apply to remuneration paid after December 31, 1984.

**Federal-State Extended Unemployment Compensation Act of 1970. Federal-State Unemployment Compensation Act of 1970, Pub. L. No. 91-373, Title II, 84 Stat. 708 (codified as amended at 26 U.S.C. § 3304 note (1976 & Supp. IV 1980), 26 U.S.C.A. § 3304 note (West Supp. 1982)), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 191, 96 Stat. 324, 407.**

"**Sec. 201 [Short title].** This title may be cited as the Federal-State Extended Unemployment Compensation Act of 1970'.

"**Sec. 202 [Payment of extended compensation]. (a) [State law requirements]** (1) For purposes of section 3304(a)(11) of the Internal Revenue Code of 1954 [subsec. (a)(11) of this section] a State law shall provide that payment of extended compensation shall be made, for any week of unemployment which begins in the individual's eligibility period, to individuals who have exhausted all rights to regular compensation under the State law and who have no rights to regular compensation with respect to such week under such law or any other State unemployment compensation law or to compensation under any other Federal law and are not receiving compensation with respect to such week under the unemployment compensation law of Canada. For purposes of the preceding sentence, an individual shall have exhausted his rights to regular compensation under a State law (A) when no payments of regular compensation can be made under such law because such individual has received all regular compensation available to him based on employment or wages during his base period, or (B) when his rights to such compensation having terminated by reason of the expiration of the benefit year with respect to which such rights existed.

"(2) Except where inconsistent with the provisions of this title, the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for extended compensation and to the payment thereof.

. . . .

"Sec. 204 [Payments to States]. (a) [Amount payable] (1) There shall be paid to each State an amount equal to one-half of the sum of—

"(A) the sharable extended compensation, and

"(B) the sharable regular compensation, paid to individuals under the State law.

. . . .

"(3) The amount which, but for this paragraph, would be payable under this subsection to any State in respect of any compensation paid to an individual whose base period wages include wages for services to which section 3306(c)(7) of the Internal Revenue Code of 1954 [section 3306(c)(7) of this title] applies shall be reduced by an amount which bears the same ratio to the amount which, but for this paragraph, would be payable under this subsection to such State in respect of such compensation as the amount of the base period wages attributable to such services bears to the total amount of the base period wages.

**42 U.S.C. § 501 (1976). Use of Available funds**

The amounts made available pursuant to section 1101(c)(1)(A) of this title for the purpose of assisting the States in the administration of their unemployment compensation laws shall be used as hereinafter provided.

**42 U.S.C. § 502 (1976). Payments to States; computation of amounts**

(a) The Secretary of Labor shall from time to time certify to the Secretary of Treasury for payment to each State which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act, such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made. The Secretary's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper and efficient administration of such law; and (3) such other factors as the Secretary of Labor finds relevant. The Secretary of Labor shall not certify for payment under this section in any fiscal year a total amount in excess of the amount appropriated therefor for such fiscal year.

**42 U.S.C. § 503 (1976). State laws, provisions required; stopping payments on failure to comply with law**

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes Provision for . . . .

**42 U.S.C. § 1101 (1976). Employment Security Administration Account – Establishment**

(a) There is hereby established in the Unemployment Trust Fund an employment security administration account.

**Amount credited to Account; transfer of funds; adjustments; repayment of internal revenue refunds**

(b)(1) There is hereby appropriated to the Unemployment Trust Fund for credit to the employment security administration account, out of any moneys in the Treasury not otherwise appropriated, for the fiscal year ending June 30, 1961, and for each fiscal year thereafter, an amount equal to 100 per centum of the tax (including interest, penalties, and additions to the tax) received during the fiscal year under the Federal Unemployment Tax Act and covered into the Treasury.

. . . .

**Administrative expenditures; necessary expenses; quarterly transfer of funds; adjustments; limitation; estimate of net receipts**

(c)(1) There are hereby authorized to be made available for expenditure out of the employment security administration account for the fiscal year ending June 30, 1971, and for each fiscal year thereafter–

> (A) such amounts (not in excess of the applicable limit provided by paragraph (3) and, with respect to clause (ii), not in excess of the limit provided by paragraph (4)) as the Congress may deem appropriate for the purpose of–
>
> (i) assisting the States in the administra-

tion of their unemployment compensation laws as provided in subchapter III of this chapter (including administration pursuant to agreements under any Federal unemployment compensation law).

(ii) the establishment and maintenance of systems of public employment offices in accordance with the Act of June 6, 1933, as amended, and . . . .

**42 U.S.C. § 1103 (1976). Amounts transferred to State accounts**

. . . .

**Transfer of funds where State is ineligible**

(b)(1) If the Secretary of Labor finds that on October 1 of any fiscal year— . . .

(B) a State is not eligible for certification under section 3304 of Title 26,

then the amount available for transfer to such State's account shall, in lieu of being so transferred, be transferred to the Federal unemployment account as of the beginning of such July 1. If, during the fiscal year beginning on such July 1, the Secretary of Labor finds and certifies to the Secretary of the Treasury that such State is eligible for certification under section 503 of this title, that the law of such State is approvable under such section 3304, or both, the Secretary of the Treasury shall transfer such amount from the Federal unemployment account to the account of such State. If the Secretary of Labor does not so find and certify to the Secretary of the Treasury before the close of such fiscal year then the amount which was available for transfer to such State's account as of July 1 of such fiscal

year shall (as of the close of such fiscal year) become unrestricted as to use as part of the Federal unemployment account.

**42 U.S.C. § 1104. Unemployment Trust Fund – Establishment**

(a) There is hereby established in the Treasury of the United States a trust fund to be known as the "Unemployment Trust Fund", hereinafter in this subchapter called the "Fund." The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all moneys deposited therein by a State agency from a State unemployment fund, or by the Railroad Retirement Board to the credit of the railroad unemployment insurance account or the railroad unemployment insurance administration fund, or otherwise deposited in or credited to the Fund or any account therein. Such deposit may be made directly with the Secretary of the Treasury, with any depositary designated by him for such purpose, or with any Federal Reserve Bank.

**42 U.S.C. § 1105 (1976). Extended Unemployment Compensation Account – Establishment**

(a) There is hereby established in the Unemployment Trust Fund an extended unemployment compensation account. For the purposes provided for in section 1104(e) of this title, such account shall be maintained as a separate book account.

**Transfers to Account**

(b)(1) Except as provided by paragraph (3), the Secretary of the Treasury shall transfer (as of the close of July 1970, and each month thereafter), from the employment security administration account to the extended

unemployment compensation account established by subsection (a) of this section, an amount determined by him to be equal, in the case of any month before April 1972, to one-fifth, and in the case of any month after March 1972, to one-tenth, of the amount by which—

(A) transfers to the employment security administration account pursuant to section 1101(b)(2) of this title during such month, exceed

(B) payments during such month from the employment security administration account pursuant to section 1101(b)(3) and (d) of this title.

If for any such month the payments referred to in subparagraph (B) exceed the transfers referred to in subparagraph (A), proper adjustments shall be made in the amounts subsequently transferred. In the case of any month after March 1977 and before April of the first calendar year to which paragraph (2) of section 3301 of the Federal Unemployment Tax Act applies, the first sentence of this paragraph shall be applied by substituting "five-fourteenths" for "one-tenth".

. . . .

**Transfers to State Accounts**

(c) Amounts in the extended unemployment compensation account shall be available for transfer to the accounts of the States in the Unemployment Trust Fund as provided in section 204(e) of the Federal-State Extended Unemployment Compensation Act of 1970.

**29 U.S.C. §49b (1976). Employment offices; development of national system; veterans' service; supplying of data in aid of administration of programs of aid to families with dependent children and child support; "State" defined.**

(a) It shall be the province and duty of the bureau to promote and develop a national system of employment offices for men, women, and juniors who are legally qualified to engage in gainful occupations, including employment counseling and placement services for handicapped persons, to maintain a veterans' service to be devoted to securing employment for veterans, to maintain a farm placement service, and, in the manner hereinafter provided to assist in establishing and maintaining systems of public employment offices in the several States and the political subdivisions thereof in which there shall be located a veterans' employment service. The bureau shall also assist in coordinating the public employment offices throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the several States. It shall be the further duty of the bureau to assure that such employment offices in each State, upon request of a public agency administering or supervising the administration of a State plan approved under part A of title IV of the Social Security Act or of a public agency charged with any duty or responsibility under any program or activity authorized or required under part D of title IV of such Act, shall (and, notwithstanding any other provision of law, is hereby

authorized to) furnish to such agency making the request, from any data contained in the files of any such employment office, information with respect to any individual specified in the request as to (A) whether such individual is receiving, has received, or has made application for, unemployment compensation, and the amount of any such compensation being received by such individual, (B) the current (or most recent) home address of such individual, and (C) whether such individual has refused an offer of employment and, if so, a description of the employment so offered and terms, conditions, and rate of pay therefor.

**29 U.S.C. § 49d (West Supp. 1982). Appropriations; certification for payment to State; definition**

(a) There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts from time to time as the Congress may deem necessary to carry out the purposes of sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39.

(b) The Secretary shall from time to time certify to the Secretary of the Secretary for payment to each State which (i), except in the case of Guam, has an unemployment compensation law approved by the Secretary under the Federal Unemployment Tax Act and is found to be in compliance with section 503 of Title 42 and (ii) is found to be in compliance with sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39, such amounts as the Secretary determines to be necessary for the proper and efficient administration of its public employment offices, but not to exceed $677,800,000 in the fiscal year beginning October 1, 1981. For purposes of this subsection, the term "proper and efficient administration

of its public employment offices" shall mean only such functions as are necessary to carry out the provisions of sections 49 to 49c, 49d, 49g, 49h, 49j, and 49k of this title and section 338 of Title 39 and shall not include functions authorized or required under Title 26, the Immigration and Nationality Act, or chapter 41 of Title 38.

### 3. Excerpts from the 1978 Legislation of California Amending California's Unemployment Compensation Law. 1978 Cal. Stat. Ch. 2

**Sec. 103.** In any action brought by cities, counties, and states coordinated by the National Institute of Municipal Law Officers or brought by the National Institute of Municipal Law Officers on behalf of cities, counties, and states, in the United States Court of Appeals for the District of Columbia or the Supreme Court of the United States, if the court stays the operation, implementation or enforcement of Public Law 94-566, then the terms of the stay automatically shall apply to this act and to all public agencies in California, including the state, counties, cities, districts, political subdivisions, and instrumentalities of any of the foregoing.

**"Sec. 104.** If the Supreme Court of the United States declares Public Law 94-566 unconstitutional or invalid insofar as it applies to unemployment insurance coverage for employees of the State of California or of local government in the State of California, then on the date the judgment or order of the court becomes final, except as otherwise ordered by the court, and to the extent permitted by federal law:

(a) The provisions of this act to the extent that they related solely or in part to unemployment insurance coverage for such employees shall to such extent be inoperative wholly or in part.

(b) The provisions of this act to the extent that they do not apply to unemployment insurance coverage for such employees shall remain to that extent operative wholly or in part.

(c) The provisions of law in effect prior to the changes made by this act shall become operative as of January 1, 1978, to the extent that they relate to unemployment insurance coverage for such employees.

(d) Local agency tax rates levied to meet costs of coverage provided for such employees shall not continue to be levied.

(e) Assets acquired and moneys collected under and as a result of the provisions of this act which would not otherwise have been acquired or collected under the law in effect pursuant to subdivision (c) of this section and deposited in or held by the School Employees Fund or its predecessor, and assets acquired and moneys collected and deposited in or held by the Local Public Entity Employees Fund, shall be refunded to the local entities which contributed to the funds. Entities which increased tax rates to provide coverage shall use the refund to reduce the property tax rate by the amount of the tax rate increase to meet costs of coverage. The remaining balance in the Classified School Employees Fund may be used pursuant to the law in effect under subdivision (c) of this section.

(f) No individual shall be liable for any overpayment of benefits which arises solely because prior law again becomes operative under subdivision (c) of this section. Any benefit award computed pursuant to a claim establishing a benefit year under the provisions of law in effect prior to the application of subdivision (a) of this section shall, if the benefit award is applicable on the date the judgment or order of the court becomes final, be recomputed under the provisions of law in effect pursuant to subdivision (c) of this section. Any benefits paid pursuant to such benefit award prior to the recomputation shall be

deducted from the maximum amount of unemployment compensation benefits payable as determined by the recomputation. If there remains a balance of the maximum amount as recomputed it shall be payable at the weekly benefit amount resulting from the recomputation if the claimant is otherwise eligible.

**"Sec. 105.** It is the intent of the Legislature in enacting this measure that, in view of the substantial impact of the unemployment insurance program on local governments, the program shall be reviewed during 1978. The review shall include an examination of eligibility requirements for, and levels, duration, and financing of benefits under the program, with special reference to the impact of local government and the property taxpayer.

**"Sec. 106.** This act is necessary to implement Public Law 94-566, which is hereby deemed to be a 'federal mandate' within the meaning of Sections 2206 and 2271 of the Revenue and Taxation Code.

**"Sec. 107.** There are no state-mandated local costs in this act that require reimbursement under Section 2231 of the Revenue and Taxation Code because this act merely affirms for the state that which has been declared existing law through action by the federal government.

**"Sec. 108.** This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Unless California, enacts this act to be operative not later than January 1, 1978, California's unemployment insurance program will be out of conformity with the mandates of federal law under Public Law 94-566. This would

seriously disrupt California's economy by the imposition of burdensome federal taxes on California employers and imperil the payment of unemployment benefits by the denial of federal funds to pay for the administration of the payment of such benefits to unemployed claimants in California. In order to preserve California's unemployment insurance system and assure uninterrupted payment of of unemployment benefits in the interest of the public peace, health, or safety, it is necessary that this act take effect immediately."

## APPENDIX F

**Materials Filed by Petitioner with the District Court in *City of Burbank v. United States.***

### 1. Complaint

SAMUEL GORLICK, City Attorney
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Attorneys for Plaintiff

FILED
JAN 17 1980
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
*Plaintiff,*

v.

UNITED STATES OF AMERICA,
The Honorable F. RAY MARSHALL
Secretary of Labor of the United States,
The Honorable G. WILLIAM MILLER
Secretary of the Treasury of the United States,
The Honorable JEROME KURTZ
Commmissioner of Internal Revenue Services of the United States,
*Defendants.*

No.80-00205 MML (GX)

COMPLAINT FOR REFUND OF FEDERAL TAXES ILLEGALLY COLLECTED

## FIRST CAUSE OF ACTION

1. This is an action for the refund of unemployment taxes paid pursuant to Federal law, 26 U.S.C. § 3301 *et seq.* and covered into the Federal Treasury, 42 U.S.C. § 503(a)(4). Jurisdiction is founded upon 26 U.S.C. § 1346(a)(1) and 7422, and upon 28 U.S.C. § 1331(a).

2. Plaintiff CITY OF BURBANK is a municipal corporation and political subdivision of the State of California, with both the power and responsibility under the laws of California for providing a wide range of essential governmental services to its residents.

3. Defendant Marshall, as Secretary of Labor of the United States, is empowered under 26 U.S.C. § 3304 to refuse to approve and certify the laws of the State of California and of each of the several States, solely because of the failure of those States' laws to conform to the requirement that the States tax themselves and their local governments – beginning January 1, 1978 – to finance unemployment benefits for former employees of State and local governments.

4. Upon the failure of Defendant Marshall to approve and certify State laws, Defendants Kurtz, as Commissioner of Internal Revenue, is empowered under 26 U.S.C. § 3301, 3302 to enforce and collect a fivefold increase in the Federal unemployment payroll tax – which increase is in the nature of a penalty – paid by private employers in nonapproved and noncertified States. The State law provisions newly required by the challenged Amendments do not finance any benefits for former employees of these private employer-Federal taxpayers, nor do these newly required State law provisions relieve private employer-Federal taxpayers of any major financing burden under the scheme of the Federal unemployment payroll tax.

5. Monies collected in State taxes and reimbursements required by the challenged Amendments must, 26 U.S.C. § 3304(a)(3), 42 U.S.C. § 503(a)(4), be forwarded immediately upon collection to Defendant Miller as Secretary of the Treasury of the United States. Defendant Miller is custodian of the Federal Unemployment Trust Fund. 42 U.S.C. § 1104.

6. Owing solely to the coercive Federal requirements imposed by the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (hereinafter "1976 Amendments"), the State of California amended its unemployment compensation laws to provide Plaintiff's employees with full unemployment insurance coverage identical to that already afforded employees of private business and industry, and to tax the cost of such benefit coverage to Plaintiff, effective January 1, 1978.

7. The legislation enacted in California to conform to the requirements of the 1976 Amendments explicitly states that it is "necessary to implement. . . a 'federal mandate'," and to avoid Federal sanctions for non-conformance which "would seriously disrupt California's economy by the imposition of burdensome federal taxes on California employers and imperil the payment of unemployment benefits. . ." within the State. Ch. 2, L. 1978 (H. 644), Secs. 106-108. The law also provides for the automatic suspension or termination of conforming public employee coverage in the event the Federal requirements of the 1976 Amendments are stayed or held unconstitutional by the Federal Courts. Ch. 2, L. 1978 (H. 644), Secs. 103, 104. A copy of these State law provisions is attached hereto as Exhibit "A", and incorporated herein by reference.

8. For the periods of July 1, 1978 to September 30, 1978, October 1, 1978 to December 31, 1978 and January

1, 1979 to March 31, 1979, Plaintiff has paid a total of $123,599.84 to the State of California solely as agent of the Federal government for collection of financing for unemployment insurance coverage of its employees, in accordance with the mandatory and coercive requirements of 1976 Amendments. The State of California has immediately upon receipt paid over this entire sum to the U.S. Secretary of the Treasury to the credit of Federal Unemployment Trust Fund as required by Federal law, 42 U.S.C. § 503(a)(4) and 26 U.S.C. § 3304(a)(3). The State of California is expressly prohibited by Fedeal law from refunding to Plaintiff the monies sued for in this Complaint, 26 U.S.C. § 3304(a)(4), 42 U.S.C. § 503(a)(5), and it would be futile to make such a request of the State.

9. Because the sum Plaintiff has paid for unemployment insurance coverage of its employees is attributable solely to the Federal requirements of the 1976 Amendments that the State of California provide such coverage and tax the costs of public employee coverage to government employers such as Plaintiff, and because the sum paid by Plaintiff has been paid over to the Treasury of the United States as required by Federal law, this sum is in fact and in law a Federal tax collected by the State under Federal mandate for uses specified and directed by Federal law.

10. The 1976 Amendments have unconstitutionally coerced the State of California to provide unemployment insurance coverage of State and local employees, and to tax the costs of such coverage to government employers, and have thereby:

a. Imposed a Federal tax upon the performance of Plaintiff's vital governmental functions by employees of Plaintiff whose unemployment

benefits are to be financed under the 1976 Amendments, in derogation of Plaintiff's constitutional immunity from Federal taxation;

b. Impaired substantially Plaintiff's ability to function effectively in our federal system of government, by directly displacing Plaintiff's policies and practices relating to compensation and personnel management of all its employees, impairing its ability to afford and budget for essential governmental services performed by all its employees, and disrupting existing governmental programs and services – all in derogation of Plaintiff's constitutional rights under the Tenth Amendment and principles of Federalism reaffirmed by the Supreme Court in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

11. Plaintiff has filed claims for refund of sum certain in accordance with the provisionsof 26 U.S.C. § 7422(a) with the District Director of Internal Revenue for the District of Los Angeles, California with cover letter dated May 21, 1979 (Exhibit "B"). Said claims demanded a total refund of said $123,599.84, plus interest allowable under Federal law, on the same grounds set forth as Plaintiff's cause of action herein. True and correct copies of said claims are attached hereto as Exhibits C, D, and E for the reporting periods of July 1, 1978 to September 30, 1978, October 1, 1978 to December 31, 1978 and January 1, 1979 to March 31, 1979, respectively, and are incorporated herein by reference. More than six months has elapsed since the filing of said claims and Defendants have taken no action. Accordingly, pursuant to applicable Federal law, said claims are deemed denied by Plaintiff.

12. Owing solely to the unconstitutional requirements of the 1976 Amendments, as alleged herein, Defendant United States of America is indebted to Plaintiff in the

amount of $123,599.84 for Federal taxes illegally assessed and collected, which amount has not heretofore been credited or refunded to Plaintiff, plus interest at the rate of 6% from the date of respective payment by Plaintiff under the challenged Federal mandate, plus similar amounts so paid and interest accruing thereon subsequent to March 31, 1979.

13. As a result of the allegations contained in paragraphs 1 through 12, inclusive, Defendant United States of America is indebted to Plaintiff in the amount of One Hundred Twenty-three Thousand Five Hundred Ninety-nine Dollars Eighty-four cents ($123,599.84), together with allowable statutory interest thereon and costs of this action.

## SECOND CAUSE OF ACTION

14. Plaintiff realleges each and every allegation contained in paragraphs 1 through 13 above as if set forth in their entirety herein.

15. Plaintiff is suffering, and will continue to suffer, grave and irreparable injury to its vital governmental operations so long as it is required to pay the federal tax costs of unemployment insurance coverage of its employees in accordance with the unconstitutional requirements of the 1976 Amendments.

16. By itself, money judgment in the amount claimed herein is wholly inadequate to provide Plaintiff sufficient relief from the continuing and irreparable injury which flows directly from the requirements of the 1976 Amendments, for money judgment alone will not terminate Plaintiff's status as a government employer subject to continuing assessment and collection of the federal tax costs of unemployment compensation in accordance with the

1976 Amendments. Continuing payments of such Federal tax costs, followed by repeated claims for refund and a multiplicity of suits for refund, is wholly inadequate both in fact and in law to free Plaintiff from the unconstitutional Federal tax burden imposed upon it by the 1976 Amendments.

17. As a result of the continuing actions of Defendants, it is requested that this Court enter declaratory judgment that the 1976 Amendments are unconstitutional on their face and as applied to Plaintiff as a government employer, and grant such further equitable relief, including permanent injunction against enforcement by Defendants Marshall, Miller, and Kurtz of those provisions of the 1976 Amendments held unconstitutional, as the Court may find necessary, just, and proper to end the illegal assessment and collection from Plaintiff of the Federal tax costs of the unemployment insurance coverage of its employees required by the 1976 Amendments.

WHEREAS, Plaintiff prays that the Court enter judgment as follows:

FIRST CAUSE OF ACTION:

1. Refund in the amount of One Hundred Twenty-three Thousand Five Hundred Ninety-nine Dollars Eighty-four cents $123,599.84, plus allowable statutory interest thereon;

SECOND CAUSE OF ACTION:

1. Declaratory Judgment that the 1976 Amendments are unconstitutional on their face and as applied to Plaintiff;

2. Issue permanent injunction against enforcement of the provisions of the 1976 Amendments so held unconstitutional.

OTHER RELIEF:

1. Cost of suit;

2. Such other relief as the Court deems just and equitable.

DATED: January 17, 1980.

SAMUEL GORLICK, City Attorney
HUSTON T. CARLYLE, Jr.
Sr. Assistant City Attorney

By: /s/ Huston T. Carlyle, Jr.
Sr. Assistant City Attorney
Attorneys for Plaintiff,
CITY BANK

**2. Exhibits A and B to Plaintiffs' Memorandum of Points and Authorities in Opposition To Defendants' Notice of Motion and Motion To Dismiss.**

EXHIBIT A

526. Plaintiff **City of Buhl,** Idaho (pop. 3,133), in order to provide essential governmental services to its residents, presently employs some 37 full and part-time employees, exclusive of those hired on a temporary emergency basis. For fiscal year 1976, Plaintiff's direct payrol expenditure for such employees amounted to $218,000. If Plaintiff is required to finance the extension of the State Unemployment Compensation Program to cover its employees in the manner mandated by the 1976 FUTA Amendments, Plaintiff will be forced to incur an additional $6,580 per annum. In order to meet these new costs, Plaintiff will be forced to cut back or discontinue existing programs and services and forego the implementation of new programs. Plaintiff may also be compelled to lay off a number of present employees.

527. Plaintiff **City of Burbank, California** (pop. 85,000), in order to provide essential governmental services to its residents, presently employs some 1,295 full and part-time employees, exclusive of those hired on a temporary emergency basis. For fiscal year 1976, Plaintiff's direct payroll expenditure for such employees amounted to $26,874,396. If Plaintiff is required to finance the extension of the State Unemployment Compensation program to cover its employees in the manner mandated by the 1976 FUTA Amendments, Plaintiff will be forced to incur an additional $322,416 per annum. In order to meet these new costs, Plaintiff will be forced to increase taxes and curtail the hiring of new employees. Service will be cut back, primarily in the areas of parks and recreation.

528. Plaintiff **County of Burke, Georgia** (pop. 18,255), in order to provide essential governmental services to its residents, presently employs some 64 full and part-time employees, exclusive of those hired on a temporary emergency basis. For fiscal year 1976, Plaintiff's direct payroll expenditure for such employees amounted to $397,000. If Plaintiff is required to finance the extension of the State Unemployment Compensation Program to cover its employees in the manner mandated by the 1976 FUTA Amendments, Plaintiff will be force to incur an additional $5,500 per annum. In order meet these new costs, Plaintiff will be forced to increase the tax burden on its residents.

529. Plaintiff **City of Burleson, Texas** (pop. 10,803), in order to provide essential governmental services to its residents, presently employs some 58 full and part-time employees, exclusive of those hired on a temporary emergency basis. For fiscal year 1976, Plaintiff's direct payroll expenditure for such employees amounted to $651,804. If Plaintiff is required to finance the extension of the State Unemployment Compensation Program to cover its employees in the manner mandated by the 1976 FUTA Amendments, Plaintiff will be forced to reduce the individual budgetary accounts for all departments, resulting in a reduction or elimination of existing programs and services.

530. Plaintiff **City of Burlingame** (pop. 26,000), in order to provide essential governmental services to its residents, presently employs some 350 full and part-time employees, exclusive of those hired on a temporary emergency basis. For fiscal year 1976, Plaintiff's direct payroll expenditure for such employees amounted to $3,900,000. If Plaintiff is required to finance the extension

of the State Unemployment Compensation Program to cover its employees in the manner mandated by the 1975 FUTA Amendments, Plaintiff will be forced to incur an additional $75.000 per annum. In order to meet these new costs, Plaintiff will be forced to increase taxes within its jurisdiction, lay off present employees and forego implementation of new programs and services. Only services within the safety area would not be cut back.

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. _____

THE COUNTY OF LOS ANGELES,
California, *et al.*,
*Plaintiffs,*

v.

THE HONORABLE F. RAY MARSHALL,
Secretary of Labor of the United States, *et al.*,
*Defendants.*

**DECLARATION OF WILLIAM F. DANIELSON DIRECTOR OF PERSONNEL CITY OF SACRAMENTO, STATE OF CALIFORNIA**

I, WILLIAM F. DANIELSON, declare:

1. I am Director of Personnel of the City of Sacramento, State of California. I have held this position since July 1, 1970. I am President Elect of the International Personnel Management Association, 1977 and will serve as President of the Association during 1978. My qualifications and educational background are accurately described in my biographical sketch, attached hereto as "EXHIBIT A".

2. This affidavit summarizes the data and conclusions presented in my report entitled, *Mandated Federal Unemployment Insurance Program Effects on State and Local Governments of California: Additional Tax Dollar Costs; Impact on California Public Personnel Systems,* attached hereto as "EXHIBIT B". This affidavit describes my calculation of the costs and impact of providing

unemployment insurance to the State and local government employees of California in both dollar and personnel management terms.

3. The 1976 Federal Unemployment Tax Act requires all State governments and their respective political subdivisions to provide unemployment insurance coverage for their employees. A State failing to enact legislation providing this coverage will be subject to decertification by the U.S. Department of Labor and expulsion from participation in the federal unemployment insurance program. The first part of this summary deals briefly with the consequences the State of California would face should it fail to comply with the federal requirement. However, the penalties inherent in non-compliance virtually compel California to extend coverage. Therefore, the bulk of this summary details the costs California and its local governments will incur by providing unemployment insurance to their employees. The costs and effects may be broken down as follows: (1) direct financial costs, as determined under the Contributory Tax, Reimbursement, and Local Public Entity Fund methods of financing; (2) administrative costs; (2) impact upon public personnel systems and the services local and state governments currently offer.

4. *Impact of Non-Compliance* Should California fail to enact legislation extending unemployment insurance coverage to State and local government employees, the State would be subject to exclusion from the federal unemployment insurance program. Such exclusion would entail harsh consequences. First, private sector employees would lose a 2.7% tax credit now granted for the federal unemployment tax of 3.4% on covered payroll. The loss of this tax credit would cost private employers of the State of California approximately one billion dollars. Second,

the State would be denied a total of $200 million in unemployment insurance payments now made by the federal government: $80 million devoted for administration of the State unemployment insurance program and $120 million constituting the federal contribution toward the extended benefits program. The magnitude of these costs effectively preclude California from choosing not to comply with the federal mandate and eventually it would be compelled to extend coverage to State and local government employees.

5. *Direct Financial Costs* California has yet to formally enact legislation appropriately extending unemployment insurance coverage. However, a law conforming to the federal requirement, Assembly Bill 644, was introduced in the 1977 assembly. It is likely conforming legislation when enacted will be substantially similar, if not identical to the provisions of Assembly Bill 644 and calculations of cost and impact of providing unemployment insurance are based on this bill. Assembly Bill 644 would provide local government in California with five alternative methods for financing unemployment insurance costs. Probable costs can be calculated for three of these methods: a Tax Contribution method, by Reimbursement, and a Local Public Entity Employees Fund arrangement.

6. Under the Tax Contribution method the State and local governments would be required to pay 3.6% of the first $7,000 ($252 per employee) of each newly covered employees wages. Based on a figure of 900,000 taxes under the Contribution method for 1978 would equal $226,800,000. For example in anticipation of these costs the City of Sacramento has budgeted $871,193. After three years the contribution rate would be adjusted to reflect the particular employer's rate of unemployment. Thus if the State experiences a high rate of unemployment

the contribution tax rate would rise accordingly in 1981. The maximum amount which could be paid in 1981 by California State and local governments is $308,700,000 based on a rate of 4.9% of first $7,000 wages ($343), times 900,000 employees. Conversely, should unemployment levels decrease, the contribution rate would be lowered accordingly. After the three year period in 1981 the lowest possible tax rate under the contributory method would total $756,600,000, calculated on the basis of 1.4% of $6,000 wages ($84) times 900,000 employees.

7. An advantage of the Contribution Tax method is that costs may be calculated precisely at the beginning of a particular fiscal year. The amounts paid by a jurisdiction under the Contribution method constitute the absolute maximum liability of the jurisdiction, regardless of an unexpected or sudden increase in the rate of unemployment. This contrasts with the Reinbursement method of financing by which a public employer pays for the actual benefits drawn by their former employees. Under this method the State unemployment insurance fund would sent the California public employer a quarterly bill for actual benefit costs.

8. While California city, county and district employment has been historically stable for career employees, there are no definite indications as to what the actual costs of the Reimbursement method might be. In part this is because many temporary and seasonal employees would be eligible for benefits since the California requirement for eligibility is that the person claiming benefits have earned $750 in a preceding base 12-month period. This relatively broad eligibility requirement would compel public jurisdictions to severely curtail temporary seasonal hiring in order to avoid the associated unemployment insurance costs.

9. Two studies have been conducted which attempt to estimate Reimbursement costs for California jurisdictions. The first, prepared by the consulting firm of R.E. Harrington (attached hereto as "EXHIBIT C") for the City of Sacramento, calculated unemployment insurance costs for 1979 under the Reimbursement method to be approximately $238,341; the highest estimated obligation to be $433,215; the lowest, $201,378. These calculations indicate unemployment insurance costs under the Reimbursement method would be 40% as much as costs under the Tax Contribution rate, with the speculative assumption that conditions in 1977 will remain substantially unchanged for the years ahead. A second study prepared by the California State Employment Development Department also figures the costs under Reimbursement to be about 40% (38.8% exactly) of the contribution rate. Therefore with an estimated cost of $226,800,000 for California jurisdictions under the Contribution Tax method, the estimated cost under the Reimbursement method will be $90,720,000. Despite this lower cost, California jurisdictions opting for the Reimbursement method run the risk of incurring sudden unemployment insurance costs while lacking budgeted funds. In effect the jurisdiction is subjected to the liabilities of being a self-insurer.

10. Under the Local Public Entity Employees Fund arrangement, participating jurisdictions would pay a tax equivalent to 0.8% of their total payroll during 1978, 1979, and 1980. As of January 1, 1981, each local public entity in the fund would pay an individual experience rated tax. However, of the 900,000 newly covered California public employees, it is estimated that a maximum of 475,000 would be eligible for coverage under this method. Assuming this maximum was covered the estimated cost is

$53,200,000. The costs for coverage of the remaining 325,000 employees whether under the Reimbursement or Contribution method would have to be added to thi estimate.

11. *Administrative Costs* California jurisdictions will also bear substantial costs for the administration of its unemployment insurance program. It will be necessary to staff for the administration of claims filed against the public employer for unemployment insurance benefits. Procedures must be established for the processing, investigation and appeal of claims. Managerial and supervisory personnel will require special training in the application of the new law. The City of Sacramento alone will incur at least $40,000 in first year administrative costs. The lowest estimated cost for the entire State is $9,000,000.

12. *Impact of Unemployment Insurance Costs on California Public Personnel Systems.* In order to pay for the new unemployment insurance costs, California jurisdictions must either raise additional revenue or reduce service levels. However, many jurisdictions have reached their taxing limits and cannot raise additional revenue. They must, therefore, begin cutting necessary services and consider employee layoffs. Programs utilizing school crossing guards, forest fire fighters and lifeguards on a temporary or seasonal basis will be reviewed for reductions to accommodate unemployment insurance payments. California jurisdictions will find themselves in the anomalous position of causing individuals to become jobless in order to pay for unemployment insurance.

13. Furthermore, otherwise socially desirable government programs will become prohibitively expensive when unemployment insurance costs are added. The areas most

directly affected will be in recreational, temporary and experimental projects hiring the young, the disadvantaged and the "hard core" unemployed. The City of Sacramento, for example, now operates a summer camp on a self sustaining basis. But unemployment insurance costs would equal half the present camp salary and force closure or drastic increases in camp fees. Innovative job-sharing programs cities have developed for the benefit of working mothers would be similarly jeopardized. With respect to efforts to alleviate chronic unemployment, California may find itself footing the massive unemployment insurance costs associated with CETA programs. Should the federal government choose to terminate its CETA unemployment insurance payments, as it has done with CETA retirement benefits, California would face costs of $25,200,000 under a contribution tax method and much higher costs under a reimbursement plan. These expenses would discourage any jurisdiction from participating in the CETA program.

14. In summary, provision of Unemployment Insurance for 1978 will impose direct costs on the State of California of $226,800,000 under the Tax Contribution method and $90,720,000 under the Reimbursement method. Administrative expenses will add at leat $9,000,000 to this cost. Finally, State and local planners will be faced with serious decisions as to which necessary services or desirable government programs will be reduced or eliminated to accommodate unemployment insurance costs.

15. Based on my long experience as a municipal personnel manager and familiarity with the needs and practices of State and local personnel management generally. I am convinced that the costs and management difficulties experienced by the State of California and the City of

Sacramento are typical of those likely to be experienced, with varying degrees, throughout the United States.

16. The above facts are true of my personal knowledge and were obtained from records or other information available to me and, if called to testify as a witness in this proceeding, I would so testify.

I declare that the foregoing is true and correct under the penalty of perjury.

Executed at Sacramento, California on November 21, 1977.

/s/ William F. Danielson
WILLIAM F. DANIELSON
Director of Personnel
City of Sacramento
State of California

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-593

# In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF BURBANK, A MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D. C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether this suit is barred by res judicata and collateral estoppel as a result of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980).

2. Whether Congress may condition the availability of federal unemployment tax credits for private employers and federal grants within a particular state upon the state's extension of unemployment compensation coverage to the employees of the state and its political subdivisions.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The district court's order of dismissal (Pet. App. 6a-7a) also is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 53a) was entered on July 6, 1982. The petition for a writ of certiorari was filed on October 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT[1]

Petitioner brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, which provide for the extension of unemployment compensation under state law to state and local government employees, are unconstitutional under the Tenth Amendment. These amendments provide for denial of tax credits against the federal unemployment tax for private employers within a state if that state government fails to extend unemployment compensation to its employees. Petitioner also sought an injunction restraining the termination of tax credits for private employers and the termination of federal grants that otherwise would result in states which fail to comply with these federal statutory amendments (Pet. App. 82a-84a). Finally, petitioner sought a refund from the federal government of unemployment insurance contributions in the total amount of $123,599.84 that it had paid under state law to the State of California (Pet. App. 78a-82a).

Under the pertinent provisions of the Federal Unemployment Tax Act (FUTA) (26 U.S.C. (& Supp. IV) 3301 *et seq.*), Section 3304(a) requires the Secretary of Labor to approve any state unemployment compensation law which he finds conforms to the federal requirements set forth in that provision. Section 3304(c) requires the Secretary of Labor to certify to the Secretary of the Treasury each state whose law he has approved. This certification is to be made annually on October 31. The certification of the Secretary

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[1]The statement that follows is substantially the same as in our conditional cross-petition in this case (No. 82-762), which we have filed pursuant to Sup. Ct. R. 19.5. That petition seeks review of the jurisdictional and standing questions presented, but only if the Court grants the instant petition.

of Labor is the prerequisite for tax credits for private employers subject to the state law and for federal grants of money.

Section 3301 currently imposes a tax on most private employers equal to 3.4% of the first $6,000 of wages paid to each employee.[2] In turn, Section 3302 permits the employer to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law.[3] This credit may not exceed 2.7% of such wages.[4] In any calendar year, however, an employer may claim this credit only if the state's unemployment compensation law "is certified as provided in section 3304 * * *" (26 U.S.C. 3302(a)(1)).

If the Secretary does not make the required certification on October 31, private employers within the state become ineligible for the FUTA tax credits for that year. An uncertified state also loses two kinds of federal grants related to unemployment. The first type of grant is for the costs of administering the state's unemployment compensation program.[5] The second type of grant is for the administration of public employment offices, which provide job-finding, placement and recruiting services.[6]

Section 115 of the Unemployment Compensation Amendments of 1976, 90 Stat. 2670-2671, amended 26 U.S.C. 3304(a)(6) and 3309(a)(1)(B) (Pet. App. 59a-60a) to

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[2]See 26 U.S.C. 3301(a) and 3306(b)(1).

[3]26 U.S.C. 3302(a)(1).

[4]See 26 U.S.C. (& Supp. IV) 3302(a)(1), (c), and (d)(1).

[5]See Sections 301-303 of the Social Security Act, 42 U.S.C. (& Supp. IV) 501-503.

[6]See Sections 1-12 of the Act of June 6, 1933, ch. 49, 48 Stat. 113-117, 29 U.S.C. 49-49k.

require, as a condition for certification, that state law provide unemployment compensation coverage for state and local government employees on the same terms and conditions as private employees. These amendments (the "1976 Amendments") apply with respect to certifications of states for 1978 and thereafter, but only with respect to services performed after December 31, 1977. Section 115(d), 90 Stat. 2671.

The district court dismissed petitioner's complaint with prejudice on the ground that it was barred by res judicata as a result of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall*, 631 F.2d 767 (D.C. Cir.), cert. denied, 449 U.S. 837 (1980) (Pet. App. 6a-7a).

The court of appeals affirmed (Pet. App. 1a-5a). It agreed with the district court that petitioner's claim for declaratory and injunctive relief was identical to the claim adjudicated in *County of Los Angeles*, so that petitioner's suit was barred by res judicata. The court of appeals further held that petitioner's claim for a refund was barred by collateral estoppel. As the court concluded, petitioner's claim for a refund turns on the same constitutional issues that the court in *County of Los Angeles* was required to resolve and did resolve in deciding the claim for equitable relief (Pet. App. 3a-5a). Neither of the courts below addressed petitioner's constitutional arguments or the federal government's jurisdictional and standing defenses.

## ARGUMENT

1. The court of appeals correctly held that petitioner's suit is barred by res judicata and collateral estoppel. There is accordingly no occasion to pass upon the merits of its constitutional challenge to the 1976 Amendments to the

Federal Unemployment Tax Act. See, e.g., *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1979).[7]

This suit is barred because of petitioner's participation as a plaintiff-appellant in *County of Los Angeles* v. *Marshall, supra,* (Pet. App. 8a-13a). That suit likewise sought a declaratory judgment that the 1976 Amendments to the Federal Unemployment Tax Act violate the Tenth Amendment, and an injunction restraining the enforcement of those amendments. The grounds were the same as alleged here: viz., that Congress' conditioning the availability of the FUTA credits and federal grants upon the extension under state law of unemployment compensation coverage to state and local government employees violates the states' Tenth Amendment rights, and also that the cost of such coverage is an excessive federal tax upon states and local governments. As the court below observed (Pet. App. 4a and n.2), petitioner concedes that the legal basis for its present complaint is the same as the legal basis for its complaint in *County of Los Angeles.* The only relevant difference between this suit and *County of Los Angeles* is that here petitioner also seeks a refund from the federal government of the unemployment insurance contributions that it has paid to the State of California.

In *County of Los Angeles*, the court of appeals rejected the challenge to the constitutionality of the 1976 Amendments (631 F.2d at 769). This suit is therefore barred by res judicata and collateral estoppel. *Montana* v. *United States*,

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[7]For the reasons set forth in our conditional cross-petition in this case (No. 82-762), this suit is also barred by the Anti-Injunction Act and the Declaratory Judgment Act, Appendix, *infra*, 1a, and by the doctrine of sovereign immunity. Moreover, petitioner lacks standing to bring this suit. While the courts below did not address the jurisdictional and standing defenses, they furnish independent and fully sufficient grounds for the dismissal of petitioner's complaint.

440 U.S. 147, 153 (1979). Petitioner's claim for declaratory and injunctive relief is barred by res judicata because the identical claim was resolved against petitioner in *County of Los Angeles*. Similarly, petitioner's claim for a refund is barred by collateral estoppel because the constitutional issues upon which that claim turns likewise were determined against petitioner in *County of Los Angeles*.

Contrary to petitioner's assertion (Pet. 28-29), the decision in *County of Los Angeles* resolved all of the constitutional issues presented. The court did not fail to decide the entire case simply because it adopted the reasoning of *State of New Hampshire* v. *Marshall*, 616 F.2d 240 (1st Cir.), appeal dismissed, 449 U.S. 806 (1980), which rejected an identical constitutional challenge to the 1976 Amendments (Pet. App. 31a-52a). Petitioner also errs in urging (Pet. 29-30) that the issues presented in the instant case are so important that the bars of res judicata and collateral estoppel should be disregarded. As this Court has admonished, "[t]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts * * *." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), quoting from *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

3. At all events, the 1976 Amendments to FUTA are constitutional. Two courts of appeals have sustained them against Tenth Amendment challenges identical to that made by petitioner here. *State of New Hampshire* v. *Marshall, supra*, 616 F.2d at 240; *County of Los Angeles* v. *Marshall, supra*. There are no decisions to the contrary. This Court, moreover, has rejected petitioner's argument (Pet. 11-13) that the FUTA tax operates coercively upon

the states. In *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585 (1937), the Court held that the FUTA tax "is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." Accord, *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 525-526 (1937). The Court recently has described the current national unemployment scheme as "federal involvement primarily through *tax incentives* to encourage state-run programs" (emphasis supplied). *New York Telephone Co.* v. *New York Labor Department*, 440 U.S. 519, 537 n.28 (1979) (quoting from *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 483 (1977)). See also, *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 310 (1943).[8]

It is therefore settled that the FUTA tax and credit scheme does not operate coercively upon the states. In so arguing, we do not suggest that the credit, and the several other substantial benefits to the states that arise from participation in the federal-state unemployment compensation system, do not present an attractive incentive. A tax credit that diverts billions of dollars of federal revenue to the states may be too attractive to decline. That fact, however, does not create an unconstitutional coercion. Tax incentives do not become penalties simply by reason of their attractiveness.

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[8]The FUTA tax credit was modeled after the former federal estate tax credit (up to 80% of the federal tax) for payment of state inheritance taxes. S. Rep. No. 628, 74th Cong., 1st Sess. 12 (1935). The Court upheld that credit against the charge that it coerced Florida into enacting an inheritance tax and injured that State by inducing potential taxpayers to withdraw property from the State. *Florida* v. *Mellon*, 273 U.S. 12, 17-18 (1927). Cf. Section 2011 of the Internal Revenue Code of 1954 (26 U.S.C.).

Since the Federal Unemployment Tax Act is not a federal mandate imposed upon the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), has no bearing upon this case. *National League of Cities* involved the mandatory extension of federal minimum wage and maximum hour requirements to employees of state and local governments. The Court held that these mandatory requirements abridged the Tenth Amendment rights of the states. As the Court stated (426 U.S. at 852; footnote omitted): "We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3." Thus, *National League of Cities* addresses only the use of the federal commerce power[9] "to directly displace" traditional state government functions. It has no application to federal programs undertaken, at the option of the states, in response to federal incentives. A state either may accept the federal conditions, and thereby receive the statutory benefits, or it may decline to participate. An unbroken line of decisions of this Court has held such "conditional" federal benefit statutes to be constitutional. See, *e.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *State of North Carolina ex rel Morrow* v. *Califano*, 445 F. Supp. 532, 535-536 & n.10 (E.D. N.C. 1977) (three-judge court), aff'd, 435 U.S. 962 (1978). Furthermore, as

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[9]The Court confined the rationale of *National League of Cities* to Commerce Clause powers. It stated (426 U.S. at 852 n.17):

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

the First Circuit observed in *State of New Hampshire*, the 1976 Amendments do not significantly alter or displace the ability of the states to structure employer-employee relationships. Unlike the minimum wage provisions condemned in *National League of Cities*, "FUTA does not set the wage rates or affect hours worked. All it does is insure unemployment benefits for state employees." *State of New Hampshire, supra*, 616 F.2d at 248.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

NOVEMBER 1982

DOJ-1982-11

# APPENDIX

Internal Revenue Code of 1954 (26 U.S.C. & Supp. IV):

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

28 U.S.C. (Supp. IV):

SEC. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

SEC. 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

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No. 82-593

IN THE

# Supreme Court of the United States

October Term, 1982

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
*Petitioner,*

v.

UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF THE CITY OF BURBANK IN REPLY

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## BRIEF OF THE CITY OF BURBANK IN REPLY

Petitioner City of Burbank ("Burbank"), through counsel, submits this reply to the Brief for the United States in Opposition ("Opposition") in the above-captioned action.

### REPLY

Only three matters addressed by respondents in their Opposition need reply. First, respondents erroneously contend that "the decision in *County of Los Angeles* [*v.*

*Marshall*[1]] resolved all of the constitutional issues presented," and, therefore, res judicata and collateral estoppel bar this suit.[2] As discussed more fully in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition"), at 25-30, and as respondents recognize,[3] in *County of Los Angeles,* the District of Columbia Circuit simply adopted the reasoning of the First Circuit in *New Hampshire Department of Employment Security v. Marshall,*[4] to which Burbank was not a party. As a result, the District of Columbia Circuit did not address the merits of Burbank's claims. Under these circumstances, application of res judicata and collateral estoppel would serve only to deny petitioner the opportunity of having its claims resolved by the courts, and, accordingly, these doctrines should not be applied.

Further, even to the extent that *County of Los Angeles* may have some applicability to the instant suit, that decision and the *New Hampshire* decision were limited to the tenth amendment issue. As such, they do not resolve the larger federalism issues, particularly petitioner's claims that the Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments"),[5] which, in rele-

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[1]631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 8a, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (82-593)).

[2]Opposition at 4-6.

[3]*Id.* at 6.

[4]616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 806 (1980) (Petition at 31a).

[5]Pub. L. No. 94-566, 90 Stat. 2667.

vant part, amended the Federal Unemployment Tax Act ("FUTA")[6] to require the States to extend unemployment compensation coverage to state and local employees, violate the doctrine of intergovernmental tax immunity and the constitutional guarantee of a republican form of government. The plaintiffs in *County of Los Angeles* sought resolution of these issues,[7] but, because the court was interested primarily in "inter-circuit comity" and the "husbanding of scarce judicial resources,"[8] its decision, at most, necessarily is limited to the tenth amendment. Consequently, res judicata and collateral estoppel are inapplicable to the federalism issues.

Second, without providing any explanation, respondents assert that petitioner "errs in urging (Pet. 29-30) that the issues presented in the instant case are so important that the bars of res judicata and collateral estoppel should be disregarded."[9] Contrary to respondents' unsupported assertion, however, the issues raised by this suit are of the greatest importance because they go to the heart of this country's form of government.

The 1976 Amendments are applicable to every state, county, city, village, township, borough, etc. throughout the United States. Under constant threat of the loss of billions of dollars to themselves and their citizens,[10] these Amendments have necessitated, and continue to necessitate, massive payments to the federal government from the budget of every State and political subdivision.

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[6]26 U.S.C. §§ 3301-3311 (1976 and Supp. V 1981), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

[7]*See* Petition at 29.

[8]631 F.2d at 768.

[9]Opposition at 6.

[10]*See* Petition at 11-13.

As this Court has emphasized, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[11] The 1976 Amendments threaten to destroy this constitutional guarantee. Accordingly, respondents' contention that the issues raised by this suit are not important is devoid of merit, and the doctrines of res judicata and collateral estoppel must not be applied to avoid resolution of these issues.

Finally, respondents argue that, in *Charles C. Steward Machine Co. v. Davis*[12] and *Carmichael v. Southern Coal & Coke Co.*,[13] the Court resolved petitioner's tenth amendment claims.[14] Apart from the fact that petitioner's claims are not limited to the tenth amendment, *Steward* and *Carmichael* do not resolve even the tenth amendment issue. As discussed in the Petition, at 29 n.84, when *Steward* and *Carmichael* were decided, Title IX of the Social Security Act of 1935,[15] the predecessor of the FUTA, did not provide for unemployment compensation coverage of state and local employees. Therefore, the Social Security Act did not necessitate the expenditures by state and local governments, with the resulting detrimental impact on state and local government operations, which the 1976 Amendments have necessitated. Accordingly, state and local governments were not party plaintiffs to the *Steward* and *Carmichael* suits.

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[11]Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869).

[12]301 U.S. 548 (1937).

[13]301 U.S. 495 (1937).

[14]Opposition at 6-8.

[15]Pub. L. No. 271, 49 Stat. 620.

Although the Court discussed the tenth amendment, it did so only in the context of the allegations made by the private party plaintiffs, who certainly lacked standing to assert the interests of the States and their political subdivisions. Thus, *Steward* and *Carmichael* do not resolve petitioner's tenth amendment claims for two reasons – one because the provisions of the FUTA as amended which petitioner challenges were not part of the Social Security Act, and two because the Court's discussion of the tenth amendment was limited to the private party context in which the claims were raised.[16]

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[16]It is noteworthy that, in attempting to distinguish the instant suit from National League of Cities v. Usery, 426 U.S. 833 (1976), respondents characterize the FUTA as a conditional federal benefit statute with which the States need not comply, and accordingly, argue that this Court has held such statutes to be constitutional. Opposition at 8. In support of their argument, respondents rely on King v. Smith, 392 U.S. 309 (1968), wherein the Court recognized that "[t]here is of course no question that the Federal Government, *unless barred by some controlling constitutional prohibition,* may impose the terms and conditions upon which its money allotments to the States shall be disbursed. . . ." 392 U.S. at 333 n.34 (emphasis added) (citing Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947), also cited by respondents). For the reasons set forth in the Petition, at 11-13, petitioner disagrees with respondents' characterization of the FUTA, and takes the position that the States' compliance with the 1976 Amendments is mandatory. However, assuming arguendo that respondents' characterization is accurate, the 1976 Amendments still may not be upheld. As the above quotation upon which respondents rely makes clear, the conditions which the federal government may impose on federal benefits are limited by the Constitution. As discussed in the Petition, at 13-25, the 1976 Amendments violate a variety of constitutional guarantees. Consequently, even under respondents' analysis, the Amendments cannot stand.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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